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Communication to the Aarhus Convention Compliance Committee

Dear Ms. Marshall,

please find enclosed our Communication to the Aarhus Convention Compliance Committee.

Kind regards,

RA W. Baumann
Accredited Administrative Law Specialist

BAUMANN RECHTSANWÄLTE
KANZLEI FÜR VERWALTUNGSRECHT

Communication to the Aarhus Convention Compliance Committee

I. Information on correspondents submitting the Communication

On behalf of

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submit the present communication to the Aarhus Convention Compliance Committee.

The communicant is a local authority in Germany on whose territory a number of projects within the meaning of Article 6, paragraph 1a of the Convention are being carried out, in particular the

construction of a flood retention scheme on the Upper Rhine. Under German law, municipalities both have administrative functions and hold a constitutional right to self-government. The right to self-government enables them to contest projects likely to affect their freedom to plan or the operation of their public installations (for details, see *infra*, at paras. 146 et seq.). By virtue of this right, the communicant is a member of the 'public concerned' within the meaning of Article 2(5) of the Convention.

II. Party concerned:

Germany

III. Admissibility of the Communication

1 The present Communication to the Aarhus Convention Compliance Committee concerns the application, in Germany, of various provisions of the Aarhus Convention on access to justice, in particular article 6, paragraphs 3 and 4, and article 9, paragraphs 2 and 4 of the Convention.

2 There is no provision in German law which would allow an individual person or a local authority to have the question clarified to what extent German legislation complies with the requirements of the Aarhus Convention. Except for article 9, paragraphs 2 and 3, insofar as these provisions govern standing to bring an action for judicial review in environmental matters, the Convention is not considered self-executing in Germany.

3 A communication to the Compliance Committee is thus the only remedy which is available.

4 Therefore, this Communication is submitted to the Aarhus Convention Compliance Committee in accordance with Article 15 of the Convention and section VI of Decision I/7 on Review of Compliance, adopted at the First Meeting of the Parties, and should therefore be found admissible.

IV. Confidentiality

5 The information contained in this Communication is not confidential.

V. Summary of the Communication

6 This Communication argues that Germany has not implemented Article 9(2) of the Aarhus Convention in a number of ways.

7 In particular, we will demonstrate (for details, see *infra*, Part 1, paras. 15 - 128) that:

- Germany does not comply with article 9, paragraph 2 of the Convention, in that the German preclusion rules limit the arguments members of the public concerned can rely on during the judicial review procedure to those raised in sufficient detail in the administrative stage.

- Germany does not comply with article 6, paragraph 3 of the Convention in that Germany sets in administrative procedures subject to the provisions of article 6, paragraph 1, clauses (a) and (b), a period of one month for informing the public and a two-week period for the public to participate during the environmental decision-making.

- Germany does not comply with article 9, paragraph 2, read in combination with article 6 of the Convention in that German law makes access for the public concerned to the judicial review procedure conditional on previous participation in the administrative decision-making on development consent.

- Germany does not comply with article 9, paragraph 4 of the Convention in that the preclusion regime, as applied by the German judiciary, renders the judicial review procedure inherently unfair for the public concerned.

8 Further, we will argue (for details, see *infra*, Part 2, paras. 129 - 167) that:

- Germany, by imposing a requirement that environmental organizations, to be able to bring an action under the Federal Conservation of Nature Act, must assert that the challenged decision contravenes a provision of the Federal Conservation of Nature Act, of Regulations adopted on the authority of this Act, of state conservation law, or of other provisions of law which are intended to at least also promote considerations of nature conservation or landscape management, fails to comply with article 9, paragraph 2 of the Convention;

- Germany, by retaining the condition that an action for judicial review of an administrative decision approving a project with significant adverse environmental effect will only be well founded if provisions of law have been breached which confer an individual public law right on the plaintiff, fails to comply with article 9, paragraph 2 of the Convention.

9 Lastly, it is submitted (for details, see *infra*, Part 3, paras. 168 - 221) that Germany, by retaining and continuing to apply simultaneously a combination of:

- Rigid, one-size-fits-all time limits for public participation;
- A regime for the preclusion of out-of-time comments;
- A regime permitting the issuance of planning consent without public participation for projects likely to have a significant impact on the environment;
- Provisions which abolish the suspensive effect of actions for rescission;
- Clauses which set a one-month time limit for the submission of and provision of reasons for a request for a ruling to establish an action's suspensive effect;
- Clauses which set a six-weak time limit for the specification of relevant facts and items of evidence in support of an action;
- Clauses which declare irrelevant and permit the retroactive correction of procedural flaws;
- Clauses which permit the retroactive amendment of the reasoning in support of an environmental planning approval decision;
- Clauses which limit the relevance of flaws in the balancing of public and private interests,
- A rule against unsolicited judicial search for flaws;
- A rule in favour of saving a flawed planning approval decision

is in non-compliance with article 6, paragraph 1(a) and (b); article 6, paragraph 3; and article 9, paragraphs 2 and 4 of the Convention.

VI. Facts and legal arguments

Relevant Provisions of the Convention

10 The following provisions of the Convention are relevant for the three Parts of this communication.

11 The preamble to the Convention includes the following clauses:

> *'Recognizing [...] that every person has the right to live in an environment adequate to his or her health and well-being, and the duty, both individually and in association with others, to protect and improve the environment for the benefit of present and future generations,*

Considering that, to be able to assert this right and observe this duty, citizens must have access to information, be entitled to participate in decision-making and have access to justice in environmental matters, and acknowledging in this regard that citizens may need assistance in order to exercise their rights,

Recognizing that, in the field of the environment, improved access to information and public participation in decision-making enhance the quality and the implementation of decisions, contribute to public awareness of environmental issues, give the public the opportunity to express its concerns and enable public authorities to take due account of such concerns,

[...]

Concerned that effective judicial mechanisms should be accessible to the public, including organizations, so that its legitimate interests are protected and the law is enforced[.]'

12 Article 2(5) of the Convention reads:

'For the purposes of this Convention,

[...]

5. 'The public concerned' means the public affected or likely to be affected by, or having an interest in, the environmental decision-making; [...]

13 Article 6, paragraphs 1(a) and (b), and paragraphs 3, 4 and 7 of the Convention read:

'1. Each Party:

(a) Shall apply the provisions of this article with respect to decisions on whether to permit proposed activities listed in annex I;

(b) Shall, in accordance with its national law, also apply the provisions of this article to decisions on proposed activities not listed in annex I which may have a significant effect on the environment. To this end, Parties shall determine whether such a proposed activity is subject to these provisions; [...]

(3)The public participation procedures shall include reasonable time-frames for the different phases, allowing sufficient time for informing the public in accordance with paragraph 2 above and for the public to prepare and participate effectively during the environmental decision-making.

(4) Each Party shall provide for early public participation, when all options are open and effective public participation can take place.

(7) Procedures for public participation shall allow the public to submit, in writing or, as appropriate, at a public hearing or inquiry with the applicant, any comments, information, analyses or opinions that it considers relevant to the proposed activity.

14 Article 9, paragraphs 2, and 4 of the Convention read:

> *'(2) Each Party shall, within the framework of its national legislation, ensure that members of the public concerned*
>
> *(a) Having a sufficient interest*
>
> *or, alternatively*
>
> *(b) Maintaining impairment of a right, where the administrative procedural law of a Party requires this as a precondition,*
>
> *have access to a review procedure before a court of law and/or another independent and impartial body established by law, to challenge the substantive and procedural legality of any decision, act or omission subject to the provisions of article 6 and, where so provided for under national law and without prejudice to paragraph 3 below, of other relevant provisions of the convention.*
>
> *The provisions of this paragraph 2 shall not exclude the possibility of a preliminary review procedure before an administrative authority and shall not affect the requirement of exhaustion of administrative review procedures prior to recourse to judicial review procedures, where such a requirement exists under national law.*
>
> *[...]*
>
> *(4) In addition and without prejudice to paragraph 1 above, the procedures referred to in paragraphs 1, 2 and 3 above shall provide adequate and effective remedies, including injunctive relief as appropriate, and be fair, equitable, timely and not prohibitively expensive. Decisions under this article shall be given or recorded in writing. Decisions of courts, and whenever possible of other bodies, shall be publicly accessible.*

Part 1: Enactment and application of provisions for the preclusion of objections

15 In this part of the communication we will argue that Germany, by enacting provisions which provide for the preclusion of objections against projects likely to have significant impact on the environment and through the way German courts apply these provisions, has violated article 9, paragraph 2, article 9, paragraph 2 read in combination with article 6, paragraph 3, and article 9, paragraph 4 of the Aarhus Convention.

16 In its findings on communication ACCC/C/2008/31 concerning Germany, at para. 64, the Compliance Committee restated its approach to reviewing a party's compliance with the Convention:

> *'As already noted in its findings on previous communications, when evaluating compliance with article 9 of the Convention, the Committee pays attention to the general picture regarding access to justice in the Party concerned, in the light of the purpose reflected in the preamble of the Convention that 'effective judicial mechanisms should be accessible to the public, including organizations, so that its legitimate interests are protected and the law is enforced' (see findings on communication ACCC/C/2008 concerning Denmark (ECE/MP.PP/2008/5/Add.4), para. 30, and communication ACCC/C/2011/58 concerning Bulgaria (ECE/MP.PP/C.1/2013/4, para. 52). The 'general picture' includes both the legislative framework of the Party concerned concerning access to justice in environmental matters, and its application in practice by the courts. Moreover, the fact that an international agreement may be applied directly and prior to national law should not be taken as an excuse by the Party concerned for not transposing the Convention through a clear, transparent and consistent framework (see findings on communication ACCC/C/2006/17 (ECE/MP.PP/C.1/2008/5/Add.10) concerning the European Union, para. 58).'*

17 With this in mind, the Communication will first point to the relevant provisions of the Convention, then introduce the relevant national law and further explain the judicial interpretation of these national provisions. Lastly, the Communication will make observations about whether German law and practice comply with the Convention.

I. Provisions of the Convention

18 This part of the communication argues breaches of article 9, paragraph 2, article 6, paragraph 3, and article 9, paragraph 4 of the Convention. For the wording of these provisions and for relevant clauses of the Convention's preamble, see supra, paras. 11, 13, 14.

II. Provisions of German law

19 There are several so-called preclusive clauses in German law. These clauses establish a right for individuals to file objections within a specified period of time in the course of an administrative procedure about granting development consent for a project having significant impact on the environment. At the same time the clauses state that, once the period for filing objections has expired, any further objections which are not based on a specific entitlement under private-law are precluded. Courts have consistently held that these clauses have a substantive rather than just a procedural preclusive effect. Substantive preclusive effect means that a failure to file objections in time during the administrative procedure extinguishes the substantive rights of the persons concerned. Thus for purposes of a subsequent lawsuit challenging the development consent, the persons concerned no longer hold any substantive rights to base their claim on (see, e.g., Bundesverwaltungsgericht (*Federal Administrative Court*), Umwelt- und Planungsrecht 1997, 31; 1997, 108). Where a person has submitted their objections out of time, that person

cannot base a subsequent judicial challenge to the development consent on these objections. Any court hearing a challenge to a development consent is required to take ex officio notice of the substantive preclusive effect (see, e.g. Kopp / Ramsauer, *'Verwaltungsverfahrensgesetz'* (Handbook on the Administrative Procedure Act), 12th edition, § 73 para. 92).

20 The following section of the Communication will present the most prominent preclusive clauses in greater detail.

1. Bundes-Immissionsschutzgesetz (Federal Pollution Control Act)

21 Section 10, subsection 3 of the Bundes-Immissionsschutzgesetz reads (emphasis ours):

> *'(3) Once the applicant has submitted a complete set of documents, the competent authority shall give public notice of the project in its official gazette and either online or in daily newspapers which widely read in the vicinity of the installation's proposed site.* ***The application and the documents submitted by the applicant, except those referred to in subsection 2 clause one [i.e. those containing proprietary information] as well as any relevant reports and recommendations which at the time of the public notice are available to the competent authority shall after the public notice for one month be displayed for inspection.*** *Any additional information which is likely to be relevant for a ruling on the project's legality and which does not become available to the competent authority until after the public notice shall be made available to the public pursuant to the provisions of the Umweltinformationsgesetz (Access to Environmental Information Act).* ***Until two weeks after the period for the display of the documents has expired, any member of the public may submit written objections to the competent authority. Once the period for submitting objections has expired, any further objections which are not based on a specific entitlement under private-law shall be precluded.'***

22 Section 10, subsection 3 of the Bundes-Immissionsschutzgesetz applies to any project within the meaning of article 6 paragraph 1 of the Convention, read in combination with Nos. 1 – 7, 15, 16, 18 and 19 of Annex I to the Convention.

2. Verwaltungsverfahrensgesetz (VwVfG) des Bundes (Federal Administrative Procedure Act)

23 Section 73, subsections 2 – 4 of the Verwaltungsverfahrensgesetz read:

> *'(2) Within one month after having received the complete plan, the hearing agency shall request any other public authorities whose responsibilities are affected by the project to*

submit their comments, and shall require the plan to be displayed at the local government authorities in whose territory the project has an impact.

(3) Within three weeks after having received the plan, the local government authorities mentioned in subsection 2 ***shall for one month display it for inspection****. The display of the plan may be dispensed with if all persons being affected by the plan are known and if they within an appropriate period of time are granted an opportunity to inspect the plan.*

(3a) Public authorities mentioned in subsection 2 shall submit their comments within a period of at most three months set by the hearing agency. Comments which have not been submitted until after the oral hearing shall not be taken into account, unless the concerns raised were or should have been known to the planning agency or are relevant for the legality of the planning approval decision.

(4) Until two weeks after the expiry of the display period, any person whose interests are affected by the project may in writing or for the record submit objections against the project to the hearing agency or to the local government authority. Where subsection 3 clause 2 applies, the hearing agency shall set the period for submitting objections. Once the period for submitting objections has expired, any objections which are not based on a specific private-law entitlement shall be precluded. This preclusive effect shall be notified to the public within the public notice of the display or within the public notice of the period for submitting objections.'

24 This provision has a wide scope of application, because the more specific Federal Planning Acts (e.g. about planning approval decisions for airports, railway lines, long-distance highways) except the Bundes-Immissionsschutzgesetz incorporate it by reference. Notably, what has been cited above is the relevant clause of the Federal Administrative Procedure Act. The Administrative Procedure Acts of the various Länder (states comprising the Federal Republic) either incorporate the complete Federal enactment by reference or enact a separate state law which, however, verbatim retraces the provisions of the Federal Administrative Procedure Act.

25 This provision requires the **displaying for one month** of the planning documents relating to a project likely to have significant impact on the environment. Subsequently there will be a two-week period within which members of the public concerned may submit objections. **By contrast, there is no fixed period for public authorities to hand in their comments; rather it is for the hearing agency to set a comment period which must not be more than three months.**

26 The more specific Planning Acts incorporate by reference the cited provisions of the Federal Administrative Procedure Act. This is what section 17a, subsection 1, of the Bundes-Fernstraßengesetz (Federal Long-Distance Highway Act) provides with regard to long-distance highway planning, section 18a of the Allgemeines Eisenbahngesetz (General Railways Act) with regard to railway line planning, section 10, subsection 2, of the Luftverkehrsgesetz (Air Traffic

Act) with regard to airport planning, section 70 subsection 1, of the Wasserhaushaltsgesetz (Water Resources Management Act) with regard to measures impacting surface waters or the groundwater, section 14a of the Bundeswasserstraßengesetz (Federal Waterways Act) with regard to waterways planning, and section 43a of the Energiewirtschaftsgesetz (Energy Act) with regard to planning of power transmission lines. There are identical provisions within the Administrative Procedure Acts of the 16 Länder which apply to planning approval decisions governed by state law.

27 **Taken together, these provisions apply to any project listed in Annex I of the Convention.**

28 **Thus German law effectively provides with regard to any projects which in accordance with the Convention are subject to public participation that objections filed out of time shall be precluded and cannot be relied on in a subsequent lawsuit challenging the development consent.**

I. Judicial interpretation of the preclusive clauses

29 The following section of the Communication will explain how the German judiciary interprets and uses the preclusive clauses just mentioned. It builds on an evaluation of cases decided within the last 5 – 6 years by the German Oberverwaltungsgerichte (Superior Administrative Courts) and the Bundesverwaltungsgericht (Federal Administrative Court).

30 In a nutshell, the German judiciary has consistently held that the preclusive clauses require an examination of every specific point a plaintiff pleads in court as to whether the plaintiff's objections submitted during the administrative procedure have mentioned exactly this particular point. To the extent they have not done so, the plaintiff's pleadings to the court will not be considered. This rule has been applied to any and all plaintiffs, no matter whether the plaintiff is a non-governmental organization promoting environmental protection, a local government body or an individual. Indeed, the courts tend to examine pleadings of non-governmental organizations promoting environmental protection more stringently than those submitted by other categories of plaintiffs.

1. Rulings relating to the preclusion of pleadings and objections submitted by non-governmental organizations

31 As regards pleadings and objections submitted by non-governmental organizations, the following general principles apply.

a) General principles

32 A non-governmental organization promoting environmental protection which has been recognized under German law will not be permitted to rely in Court on any argument it failed to raise during the administrative procedure, but which it could have raised during the latter procedure in view of the documentation made available to it.

33 Non-governmental organizations are under a specific 'burden of cooperation' to the effect that, when submitting objections in an administrative procedure, they at least need to explain which aspect of the local ecology is affected by the project, at what location and in what way this aspect is affected (see Koblenz Superior Administrative Court, judgment of 10 March 2009, 8 C 10435/06, para. 35 – German version available from www.juris.de).

34 Thus non-governmental organizations are obliged to contribute their special expertise as early as during the administrative procedure (Federal Administrative Court, order of 9 August 2010, 9 B 10/10, followed by Munich Superior Administrative Court, order of 18 February 2011, 22 CS 10.2460, para. 15; Muenster Superior Administrative Court, judgment of 31 May 2011, 20 D 80/05.AK, para. 101).

35 Nongovernmental organizations (hereinafter: 'NGO') promoting environmental protection cannot be expected to submit an in-depth scientific presentation to academic standards or to draw correct legal conclusions. What they need to do, though, so as to meet their burden of cooperation, is to provide a rough and itemized explanation as to which Special Area of Conservation likely will be affected by the project and why there likely will be an interference with the conservation objectives of said Special Area of Conservation (see Koblenz Superior Administrative Court, judgment of 10 March 2009, 8 C 10435/08, para. 35 – German version available from www.juris.de).

36 In this regard, a registered environmental nongovernmental organization can be required to present more sophisticated expert statements than would be expected from a layperson (Mannheim Superior Administrative Court, judgment of 20th July 2011, 10 S 2102/09, para. 78, citing Federal Administrative Court, judgment of 9th September 1988 – 80 BVerwGE (Federal Administrative Court Reports) 207).

37 The more substantial and detailed the manner in which the applicant has assessed and evaluated the project's impact on local ecology, the higher the degree of detail in which an NGO in its objections must discuss the available documentation (see, e.g., Koblenz Superior Administrative Court, judgment of 10 March 2008, 8 C 10435/08, para. 35; Münster Superior

Administrative Court, judgment of 31 May 2011, 20 D 80/05 AK, para. 101; Mannheim Superior Administrative Court, judgment of 20 July 2011, 10 S 2102/09, para. 78; Münster Superior Administrative Court, judgment of 1 December 2011, 8 D 58/08 AK, para. 188 – all available in German from www.juris.de).

38 More specifically, where an NGO claims that an expert study submitted in support of the project lacks the requisite degree of thoroughness, the NGO will be expected to substantiate this claim to a sufficient extent, and to enumerate the specific local components of flora and fauna whose conservation it believes is put at risk by the project. Unless the NGO does present this kind of substantial and detailed challenge to the conservation plan submitted in support of the project, the consultation of registered NGOs misses its purpose of introducing into the administrative procedure their specific expertise in a similar manner as that of public conservation authorities (Koblenz Superior Administrative Court, judgment of 10 March 2008, 8 C 10435/08, para. 35 – German version available from www.juris.de, citing Federal Administrative Court, judgment of 2 January 2004, 2004 Baurecht 964, also available from www.juris.de, para. 27).

39 The objections submitted by an NGO must enable the applicant and the competent authority to ascertain why specific points warrant further investigation or why an assessment is considered to be unpersuasive (see Kassel Superior Administrative Court, judgment of 21 August 2009, 11 C 318/08 T, para. 408 – available in German from www.juris.de, citing Federal Administrative Court, judgments of 1 April 2004 – 4 C 2.03 –, 120 BVerwGE 276, and of 22 January 2004 – 4 A 4.03 –, 2004 Umwelt- und Planungsrecht 266; in the same vein Bautzen Superior Administrative Court, judgment of 15 December 2011, 5 A 195/09, para. 92).

40 What NGOs also must do is present a critical, in-depth discussion in terms of conservation technique of the evidence submitted in support of the project (expressly to this effect Munich Superior Administrative Court, judgment of 30 September 2009, 8 A 05.40050, para. 72, citing Federal Administrative Court, judgment of 12 April 2005, 2005 Neue Zeitschrift für Verwaltungsrecht 943, at 946).

b) Examples to illustrate judicial use of the general rules

41 The above rules relating to the admissibility of 'counterclaims' made by NGOs impose on these organization in each specific case a significant 'burden of argument', as will be illustrated by examples from the case-law.

42 For instance, in its judgment of 10 March 2009, 8 C 10435/08, at para. 38, Koblenz Superior Administrative Court found fault with an NGO's failure to mention in its objections that the

priority species alnus glutinosa and Luzulo-Fagetum beech forests as well as protected tall grasslands would be affected by the road building project at issue; in the Court's view, the documents which had been made available during the administrative procedure had clearly pointed to the occurrence of these species and habitats. The Court did not permit the plaintiff NGO to raise these points at trial.

43 Similarly, Lüneburg Superior Administrative Court felt that there was no reason for it further to investigate the claim made by an NGO that a protected Natura 2000 habitat (alluvial forests with alnus glutinosa and fraxinus excelsior, since the NGO had failed to mention this specific aspect in the objections it had submitted during the administrative procedure. In the Court's view, the NGO should have specified in its objections the exact location of the protected habitat which might be affected, unless this particular aspect would have been self-evidently visible (judgment of 20 May 2009, 7 KS 28/07, para. 47, citing Federal Administrative Court, judgment of 22 January 2004 – 4 A 4.03 –, 2004 Deutsches Verwaltungsblatt 655; order of 12 April 2005 – 9 VR 41.04 –, 2005 Deutsches Verwaltungsblatt 916, at 919; order of 23 November 2007 – 9 B 38.07 – , 2008 Natur und Recht 178, at para. 31).

44 The German administrative judiciary has held that the rules about objections by NGOs being precluded apply to all procedures relating to projects within the meaning of the Directive 85/337/EEC on Environmental Impact Assessment. For instance, the Bavarian Superior Administrative Court in its judgment of 23 June 2009 (8 A08.40001, paras. 56 et seq.) held that the preclusion rules applied to the claim of an NGO that no active noise abatement measures had been taken for the benefit of a residential area affected by the road building project at issue, and that the impact on the area could have been mitigated or removed by way of optimizing the road' location (loc. cit., paras. 47 and 120).

45 The Courts will examine with regard to each specific point being made whether the environmental protection organization's pleadings should be considered precluded. Thus the German judiciary has frequently held that an NGO not just has to state in its objections during the administrative procedure that the project at issue does not comply with the law on protection of species. What the NGO must do is submit in its objections a detailed discussion of specific species and of the project's impact on them. There are a huge number of cases which have applied this rule.

46 For instance, the Bavarian Superior Administrative Court faced a claim by an NGO to the effect that the road building project at issue had unlawfully been granted an exemption from the rules

relating to the protection of Barbastella barbastellus, Bombina variegata, Hyla arborea, and Lopinga achine, and that there had been a breach of species protection law with regard to Coronella austriaca. The Court noted that the NGO in its objections during the administrative procedure had only mentioned Barbastella barbastellus. For this reason the Court held that the organization's pleading with regard to the other species was precluded (Munich Superior Administrative Court, judgment of 23 June 2009 (8 A 40001), paras. 61 and 126). In the Court's view, the plaintiff NGO could reasonably have been expected to enumerate in its objections the affected components of local fauna and flora so as to enable the competent authority to investigate the specific risks resulting from the project (ibid., para. 61, citing Federal Administrative Court, judgment of 23 November 2007, 2008 Natur und Recht 176, at 179, and judgment of 30 January 2008, 2008 Natur und Recht 406, at 408). Since the documentation submitted in support of the project had included detailed references to all species the plaintiff had mentioned in its submission to the Court, the Court believed that the plaintiff in its role of registered environmental NGO could during the administrative procedure easily have submitted more detailed objections about specific breaches of the law relating to the protection of species (Munich Superior Administrative Court, ibid., at paras. 61 and 126 – available from www.juris.de).

47 In a similar vein, Munich Superior Administrative Court regarded as precluded an NGO's complete pleading against the assessment of protected species submitted in support of the project. Thus the Court prevented the NGO from raising at trial that the area for investigating impacts on protected species had been inappropriately limited to the actual site of the quarry at issue; that an inappropriately short period of investigation had been chosen; that there had been no documentation of strongly protected species; that the project would have a significant impact on the overall appearance of the landscape; and that there had been a breach of the law relating to interference with the ecological capacity of the project site (Munich Superior Administrative Court, Order of 18 February 2011, 22 CS 10.2480, paras. 10, 12, and 13).

48 The same principles apply where an NGO claims in court that a project has adverse effects on a Special Area of Conservation within the meaning of the Habitats Directive 92/43/EC: The courts will investigate each argument made in the NGOs submissions at trial as to whether exactly the same point was raised during the administrative procedure. To the extent this is not the case, the courts will refuse to hear the NGO's pleadings. The courts believe that this refusal to hear the NGOs precluded arguments is what the relevant legislation requires (see, e.g., Koblenz Superior Administrative Court, judgment of 8 July 2009, 8 C 10399/08, para. 138; Münster

Superior Administrative Court, judgment of 19 August 2010, 11 D 26/08 AK, para. 25 – available from www.juris.de). This approach effectively imposes on NGOs a burden of substantiation which these organizations whose staff is almost all volunteers just cannot meet.

49 For instance, Koblenz Superior Administrative Court refused to investigate a claim by an NGO to the effect that the 'Wagbachniederung', i.e. a de facto special protected area within the meaning of Directive 79/409/EEC, would suffer deterioration as a result of the project at issue. The Court found that the NGO had failed to raise this issue during the administrative procedure. The relevant part of the Court's opinion reads (Koblenz Superior Administrative Court, judgment of 8 July 2009, 8 C 10399/08, para. 140/1 – available from www.juris.de):

> *'In the plaintiff's written objections of 17 October 2005 [...], there is no reference whatever to the 'Wagbachniederung' de-facto special protected area. More particularly, the plaintiff's objections in their section about 'Protected areas' only mention possible disturbances on 'Horn' islet and in the 'Goldgrube' area; there is no reference to areas located on the right bank of the Rhine. However, the plaintiffs should have raised the conservation issues relating to the latter areas, since they inspected the study – submitted in support of the project – by 'Cologne Consultants for Faunistics' relating to the project's compatibility with special protected areas. This study, on p. 22 et seq., discussed the "Wagbachniederung'- area no. 6717-401 reportable for purposes of protecting wild birds' in detail and found that with regard to it there was no risk of significant disturbance. Only in its written objections of 9th September 2003 submitted to the Spatial Planning Procedure – once again handed in as annex to its written objections of 17th October 2005 – did the plaintiff in general terms point to 'additional noise pollution to the detriment of protected birds which frequently occur to the South and South-east of Speyer', likely to result 'from 'so-called circling approaches which will inevitably take place frequently above the alluvial forests in the wider vicinity of the airfield'. In view of the fact that the study about the project's compatibility with bird protection rules – which the plaintiff had access to – provided an in-depth discussion of the 'Wagbachnederung' protected area, these general references fall far short of the requirements applicable to NGOs for substantiating objections.*
>
> *Thus the plaintiff up until the grant of the planning approval decision failed to submit sufficiently specific objections relating to possible substantial disturbances of the 'Wagbachniederung' de-facto special protected area, despite having grounds to do so after having had access to the relevant study. For this reason the plaintiff's complete argument relating to this issue must be regarded as precluded, by virtue of section 61 subsection 3 of the Federal Conservation of Nature Act (Bundesnaturschutzgesetz).'*

50 Furthermore, the Court ruled that additional pertinent objections by the plaintiff NGO were precluded. To illustrate the strict standards against which the German judiciary measures NGOs' objections, we will present the relevant part of the court's opinion verbatim (Koblenz Superior

Administrative Court, judgment of 8 July 2009, 8 C 10399/08, paras. 173 – 176, available from www.juris.de):

> *'The written objections of 17 October 2005 make specific reference only to LRT 91FO with regard to the extent and significance of possible impacts on hard-wood alluvial forests located on 'Horn' islet, to the significance of Myotis bechsteinii occuring on 'Horn' islet, to the impact of measures taken on 'Horn' islet might have on Lucanus cervus populations, as well as to the effectiveness of mitigation measures. Furthermore, in view of the plaintiff's relating to species protection law, the populations of amphibians occurring in the 'Goldgrube' area and their winter rest areas on 'Horn' islet (and thus the annex-II-species Triturus cristatus) can be regard as having been discussed with sufficient specificity. In addition, one must not find fault with the plaintiff's failure during the administrative procedure to discuss in any detail the Gortyna borelii moth: The compatibility study – submitted in favour of the project – does not do more than mention this species in passing rather than discuss it in any degree of depth, since this species only had been included subsequently in the conservation objectives of the area.*
>
> *However, the plaintiff's complete additional pleading at trial was not even rudimentarily raised during the administrative procedure, and thus must be regard as precluded, except where it discusses legal issues. In particular, preclusion applies to the plaintiff's argument that deposition of air pollutants caused by increased air traffic likely will significantly affect habitat types located in the Special Area of Conservation. Even though the compatibility study of 18th June 2005 (Folder 4, part IV.2 of the administrative record) provided an in-depth discussion of 'pollutant emissions' as operational impact factors, more particularly as a result of increased numbers of flight movements for executive travel (in general terms on p. 52/3, and with regard to habitat types on p. 73 et seq. of the compatibility study), the plaintiff in its written objections failed to raise the increased effect of the project's operational pollutant deposition in the soil on the habitat types relevant for the conservation objectives applicable to the Special Area of Conservation. The plaintiff's written objections only vaguely and in a different context – that of immission of pollutants rather than of the impact of pollutant depositions in the soil on relevant habitat types - refer to the 'Technical Study on Air Pollutants' by Dr (Eng.) D (Folder 3, part II.4 of the administrative record), which formed the basis for the study on the project's compatibility with Habitats law. Even to the extent that the plaintiff's own study on species protection law discusses 'operational deposition of pollutants in the context of reconfiguring the K3', this only relates to Natrix natrix and Lacerta agilis, rather than to the conservation objectives. Up until the grant of the planning approval decision, the plaintiff failed to raise the issue of pollutant deposition at any other point.*
>
> *Since the plaintiff until the termination of the administrative procedure only raised LRT 91 F0 'hard-wood alluvial forests' as a habitat type determinative for the conservation objectives applicable to the Special Area of Conservation, in addition its pleadings at trial relating to the habitat types 91E0 ('soft-wood alluvial forests'), 3150 ('natural eutrophic lakes'), 6430 ('hydrophilous tall herb fringe communities'), and 6510 ('lowland hay*

meadows') must be regarded as precluded: the study on the project's compatibility with Habitats law – which the plaintiff did inspect – provided an in-depth discussion of possible adverse effects resulting from the project's operational impacts on all these habitat types.

Lastly, the plaintiff failed to raise during the administrative procedure possible effects on the butterfly species 'Callimorphia quadripunctaria', 'Lycaena dispar', and 'Phengaris nausithous' – all of which had been discussed in the study on the project's compatibility with Habitats law.

51 This judgment of Koblenz Superior Administrative Court clearly indicates that, so as to avoid their pleadings at trial being regarded as precluded, an NGO as early as in its objections during the administrative procedure must make a specific reference to any and all anticipated significant adverse impacts on protected habitats and species. What is required is not just an enumeration of the relevant Special Areas of Conservation and Special Protected Areas, but also an in-depth discussion as to which effects of the project (air pollution, noise etc.) likely will cause which specific impacts on the protected areas.

52 An even more illustrative example for this judicial approach is the judgment delivered by Münster Superior Administrative Court on 31 May 2011 (20 D 80/05, at para. 103). The court pointed to the study confirming the project's compatibility with Habitats law which had provided an in-depth refutation of concerns relating to possible impacts on a specific habitat type (91E0), while acknowledging a reduced variety of species and density of individuals likely to result from the dissective effect of a projected tunnel. In view of this, **the Court believed that the plaintiffs as early as during the administrative procedure would have been required expressly to raise its concerns about adverse impacts on the habitat type 91E0, specifically about the dissective effect of the projected tunnel likely causing the extinction of species characteristic for this particular habitat type.** The Court noted that the plaintiff on various occasions in its written objections **had pointed to migration movements of animal species likely being interrupted, to the area's permeability with regard to animals likely being impaired, to the tunnel likely becoming a 'death-trap' for a large number of species, to significant damage in particular for Lampetra planeri, to a negative impact on species characteristic for the Special Area of Conservation, to the separation of the brook's upper and lower reaches, the effective dissection of the brook, of the alluvial system and the alluvial areas adjacent to the brook, as well as to the occurrence of a priority habitat. In the Court's view, though, all this did not amount to a specific reference to an adverse impact exactly on the habitat type 91E0, and thus the plaintiff's pleadings at trial had to be regarded as precluded.**

53 Even though the Court on this occasion did note that the NGO had submitted written objections raising a variety of specific concerns, the salient point in the Court's view was that a specific pleading at trial had not been made in exactly the same phrasing during the administrative procedure.

54 As regards species protection law, what the NGO must do is in its objections raise any and all relevant species so as to avoid its pleadings at trial being held precluded (in the same vein, see also Mannheim Superior Administrative Court, judgment of 7 August 2009, 5 S 2348/08, para. 45: held that the plaintiff's pleading at trial about impacts on Unio crassus populations in the Brunnisach brook was precluded, since the plaintiff in its written objections during the administrative procedure only had raised concerns about protecting the Brunnisach alluvial area rather than the Brunnisach itself and the Unio crassus population occurring in this water body).

55 Another example is Munich Superior Administrative Court's judgment of 30 September 2009, 8 A 05.40050 et al. – available from www.juris.de). The Court indicated that NGOs in their objections during the administrative procedure need to explain in detail which species they believe will be affected by the project and why they think there will be an infringement of the law on protection of species. Should an NGO **in its role of assistant for the administrative authority** fail plausibly to define the appropriate area of investigation affected by the project, to enumerate the species sufficiently certain to occur in this area of investigation, and to explain the risks for the affected populations, its complete pleadings at trial relating to the law on conservation will be regarded as precluded (ibid., at para. 70). In effect the Court did find that the plaintiff NGO's pleadings were precluded, since the plaintiff 'only in general terms by way of a bracketed addition in the context of its concerns about the loss of valuable habitat types in the core zone of the 'Kalten' protected area' had raised the issue of species being placed at risk (ibid., at para. 73). The Court found fault with the plaintiff's failure to enumerate specific species being endangered, and to make clear statements about those species' populations, their sizes, and their spatial occurrence (ibid.).

56 Similarly, Munich Superior Administrative Court in its order of 19 April 2011, 8 ZB 10.129, at para. 15/6, held that the plaintiff NGO's pleadings about risks to species other than those mentioned in its written objections were precluded ('[...] that is with regard to all species except Ciconia ciconia, Perdix perdix, Aricia eumedon, and Lepus europaeus').

57 In the Communicant's view, the main problem with the Court's approach to the preclusion issue is that environmental NGOs most of whom are staffed by volunteers are quite unable to meet

their burden of substantiation, in particular with regard to major infrastructure projects with their multi-folder administrative records. For instance, just the study on the project's compatibility with Habitats law which Koblenz Superior Administrative Court pointed to in its judgment about the proposed Speyer airport expansion (8 C 10339/08, see *supra*, para. 49 *et seq.*) was more than 70 pages. It is completely unreasonable for the courts to require environmental NGOs thoroughly to evaluate this kind of voluminous documentation within two weeks so as to submit written objections referring to specific adverse impacts on enumerated species and / or on specified conservation objectives. The German judiciary completely disregards the immense volume of the documentation usually submitted in support of major projects, and applies the 2-week period for filing objections equally to small and very large projects.

58 A good example for this approach is the judgment about the expansion of Frankfurt/Main International Airport which Kassel Superior Administrative Court rendered on 21 August 2009 (11 318/08 T, available from www.juris.de). The Court held that the plaintiff NGO's pleadings at trial about the risk of mortality for birds resulting from wake turbulence were precluded. The relevant section of the Court's opinion deserves a verbatim rendition (ibid., paras. 407 – 411, emphasis ours):

> *'Admittedly, the plaintiff* ***in its several hundred page long sets of written objections dated 11 March 2005 and 7 May 2007 evaluated the documents submitted in support of the project, provided ecologically expert comments on them and submitted objections which reflect a high level of analysis.*** *However, the plaintiff failed during the administrative procedure to raise the issue of protected birds in the 'Untermainschleusen' Special Protected Area falling victim to wake turbulence near kilometer 14.4 of the River Main – that is, the issue which now is the subject of the plaintiff's pleadings at trial.*
>
> *There is no reference whatever to wake turbulence in the plaintiff's written objections of 11 March 2005 (Appendix 1 to the plaintiff's statement of reasons in support of its action of 24 March 2008).*
>
> *Likewise, there is no relevant reference in the written objections of 7 May 2007 (Appendix 3 to the plaintiff's statement of reasons) to the risk of wake turbulence for birds protected in the 'Untermainschleusen' Special Protected Area.* ***Admittedly, the plaintiff does discuss the risk posed by wake turbulence for Myotis bechsteinii, Myotis myotis, and Lucanus cervus. In addition, the plaintiff raises the safety risks created by wake turbulence especially for humans. However, the increased risk from wake turbulence of mortality for bird species which are protected through the 'Untermainschleusen' Special Protected Area is not a topic of the objections.*** *This remains true even in view of footnote 135 on page 91 of the written objections. At this point the plaintiff notes the lack of any substantial discussion of the risks wake turbulence causes for protected species and habitats, and expresses its opinion that such a discussion should be initiated with regard to European special areas of*

conservation and protection of species. This footnote is in an obvious context with the plaintiff's statement on page 91 relating to disturbance of Myotis Bechsteinii by wake turbulence. In view of the applicant having submitted voluminous and thorough documentation and expert evaluation of possible risks to avifauna from the future airport operations, and in view of the degree of detail otherwise reflected in the plaintiff's written objections, the passing reference in footnote 135 on page 91 of the written objections of 7 May 2007 did not provide sufficient reason for the applicant and the competent authority to conclude that further investigation of the mortality risk for avifauna near kilometer 14.4 of the River Main might be warranted.

Neither does the expert opinion by Schreiber on the 'compatibility study relating to strictly and strongly protected species' which the written objections of 7 May 2007 refer to on page 254 point to such a need for further investigation. ***Schreiber – in respect of bird species protected in the 'Untermainschleusen' special protected area – only points to a risk from wake turbulence for Ardea cinerea (p. 88) and Phalacrocorax carbo (p. 290). As regards Ardea cinerea, Schreiber states that the prohibition of disturbance relating to special protected areas creates a significantly more precautionary standard than what the documentation in support of the project were based on, and that the issue of wake turbulence had not been considered at all. This does not amount to an indication of a mortality risk for this species near kilometer 14.4 of the River Main.*** *The same considerations apply to Schreiber's remarks in regard of Phalacrocorax carbo (p. 290). As regards this species, Schreiber only mentions the destruction of habitats by wake turbulence. Lastly, neither do the statements about Larus ridibundus (p.209), including their reference to Anas rufina (p.253), provide any indication that there might be a mortality risk from wake turbulence at kilometer 14.4 of the River Main.'*

59 This judgment indicates that the plaintiff NGO not only submitted several hundred pages of written objections, but also as early as during the administrative procedure commissioned an ecologist's expert opinion for incorporation in its written objections. Nevertheless, the NGO failed to obtain comprehensive judicial review of the planning approval decision. Rather, the NGO's pleadings with regard to the mortality risk for avifauna were held to be precluded, even though the NGO by means of the ecologist's expert opinion effectively had raised the danger of wake turbulence for avifauna. However, the Court considered the submission made during the administrative procedure insufficient because there had been no sufficiently precise reference to each relevant species, and moreover there had been no mention of kilometer 14.4 of the River Main, which later had become the topic of the plaintiff's pleadings at trial.

c) Interim conclusion

60 The above presentation of sections from the case-law clearly demonstrates that the German judiciary considers a plaintiff precluded at trial with regard to each single argument against a project likely to have a significant impact on the environment, where the plaintiff failed to include exactly the same point in its objections made during the administrative procedure.

2. Case-law relating to the preclusion of individuals and other members of the public concerned

61 The following section will present the principles German courts have applied when deciding whether objections by 'other members of the public concerned', i.e. by objectors who are not NGOs promoting the protection of the environment are to be considered precluded.

a) General requirements

62 In order to be considered relevant, an objection shall indicate in what respect the objector has concerns about the project. The submission must be reasonably specific to permit a determination by the competent authority as to how to carry out a further consideration of specific issues (Federal Administrative Court, order of 28 July 2006 – 9 B 3/06, [2006] Deutsches Verwaltungsblatt 1298, relating to planning of railway lines; see also orders of 12 February 1996 – BVerwG 4 VR 19.95, Buchholz 407.4 § 17 FStrG No. 109 p. 76, and of 16 October 2001 – BVerwG 4 VR 20.01 – Buchholz 407.4 § 17 FStrG Nr. 185 p. 83).

63 This rule applies to both Pollution Control Law and Specialist Planning Law (see Federal Administrative Court, order of 24 July 2008 – 7 B19/06; Munich Superior Administrative Court, judgment of 18 February 2011 – 22 CS 10.2460). For an objection to be considered relevant, it shall include a reference to the affected interests as well as an explanation of the anticipated specific interference with those interests. It shall at least in general terms indicate which adverse effects the objector anticipates (see Federal Constitutional Court, judgment of 8 July 1982, 61 BVerfGE 82, 117/8; Federal Administrative Court, order of 30 January 2008, 2008 Neue Zeitschrift für Verwaltungsrecht 678).

64 The requirements as to substantiation of objections are geared to the capabilities of affected non-experts. As a rule objectors cannot be expected to develop arguments requiring technical expertise. Similarly, objectors cannot be required to develop a legal argument based on their objections (see Federal Administrative Court, judgment of 14 July 2011 – 9 A 14/10). Objections should relate to the documents in support of the project which were available for inspection. Thus an objector can be expected to raise all arguments against the project which – in view of the available documents – a non-expert in the objector's situation and having the objector's knowledge and experience would be able to recognize (see, in this vein, Munich Superior Administrative Court, order of 22 March 2012 – 22 B 12.149, para. 13, available from www.juris.de).

65 These principles in effect apply to all procedures about the development consent for projects with regard to which the Convention requires public participation. This is a consequence of the

cases to be presented next, which will explain which specific pleadings at trial effectively were disregarded by the German judiciary.

66 **Even though the general principles just mentioned would seem to indicate some degree of generosity on the Courts' part, the way these principles have been applied to individual cases clearly shows that individuals and local government bodies are expected to meet a substantial burden of substantiation.**

b) Specific examples relating to preclusion of objections in proceedings under Immission Control Law

67 The leading case about preclusion of objections in the area of Immission Control Law is the order rendered by the Federal Administrative Court on 24 July 2008 (7 B 19/08), where the Court refused to hear a municipality's pleading that the adverse effects on the environment resulting from the operation of the installation at issue would interfere with the municipality's right to enjoy the use of its property. Once again, the relevant section of the Court's opinion (ibid, para. 12 – available from www.juris.de) deserves a verbatim rendition – emphasis ours:

> *'As a matter of principle, during the administrative procedure about development consent under Immission Control law the petitioner is entitled to raise in its objections possible adverse effects of the installation's operation on petitioner's right to enjoy its property (s. 6 subs. 1 No. 1 read in combination with s. 5 of the Federal Immission Control Act). Notably, s. 5 subs. 1 No. 1 of the Federal Immission Control Act confers standing to sue on individuals (judgment of 11 December 2003 – BVerwG 7 C 19.02 – 119 BVerwGE 329, 332 [...]). But,* ***so as to avoid their claim at trial about anticipated interference with its right to enjoy its property being precluded,*** *the petitioner should have* ***substantiated*** *this point in its* ***objections. However, the only points the petitioner did raise in its objections were possible risks to its municipal water supply in the 'Engerser Feld' from atmospheric transfer of pollutants and consequent pollution of ground water.*** *The Court of first instance made detailed comments on this point in its interim relief order referred to in the judgment under appeal, without the petitioner having challenged this.*
>
> *The petitioner raised the issue that* ***other municipal installations would likely be affected for the first time at trial and thus out of time.'***

68 Schleswig Superior Administrative Court held that the complete pleadings submitted by a private individual at trial, to the effect that the construction of the installation at issue would cause adverse effects, had to be regarded as precluded (judgment of 2 February 2010 – 1 KS 3/07, para. 32 – available from www.juris.de). **The Court believed that the plaintiff had failed to submit sufficiently detailed objections with regard to pollution from the construction works,**

because in the Court's view the plaintiff's objections had exclusively referred to the installation's operation. Thus even though the plaintiff had filed objections as required and had mentioned possible adverse effects of pollution, the plaintiff according to Schleswig Superior Administrative Court would have been obliged to distinguish the construction phase and the subsequent operation of the installation, so as to retain its right to plead at trial that the pollution resulting from the construction works was unacceptably serious.

69 The judgment Weimar Superior Administrative Court delivered on 16 March 2010 (1 O 656/07, paras. 61/2 – available from www.juris.de) demonstrates that even non-expert private individuals affected by a project to which Immission Control Law applies are required to submit highly specified objections – which it is submitted members of the public concerned are unable to do, unless they as early as during the administrative procedure commission legal and technical expert advice:

> *'To the extent that the plaintiffs argue that on plots of land near the points of maximum deposition as calculated by Dr S. there has been a breach of precautionary values set out in the Federal Soil Protection and Contaminated Lands Regulations, the plaintiffs' pleading at trial must be regarded as precluded. For as regards the study the plaintiff submitted at trial, and its reference to specific plots of land near the above points of maximum deposition, the plaintiffs in their objections failed to raise this point; neither did they state that they are the owners of said plots of land. Also, there is no indication in the objections that the plaintiffs' own land might be affected. Likewise, in the joint objection which by the way is not referred to in the plaintiffs' own written objections there is some reference to the risk of soil contamination which however lacks specificity and does not address particular plots of land.*
>
> *Otherwise, the plaintiffs in their objections only pointed to increased noise from heavy lorry traffic likely to be attracted by the installation. Thus their pleading with regard to other instances of noise caused by the installation must be regarded as precluded.'*

70 The section just cited indicates that individuals and municipalities likely to be affected must as early as during the objection phase substantiate their concerns about soil contamination with reference to specified precautionary values and to particular plots of land. Also, where the individual has concerns relating to noise, a detailed explanation will be required as to which specific adverse effects of noise (e.g. from which particular sources of noise) are being referred to.

71 An order by Berlin-Brandenburg Superior Administrative Court of 29 July 2010 (11 S 45.09, at para. 5) further illustrates the way the Courts impose a manifestly unreasonable burden of substantiation on members of the public concerned (emphases ours):

> *'This [i.e. the question whether preclusion should be held to apply] firstly concerns the* ***appellant's pleading as far as it does not relate to noise effects, but to other kinds of immissions, such as dust, vibration, and as far as it casts doubt on the installation's operational safety.*** *[...] [The Court of first instance found that] in the objections the appellant had made within the requisite period there had been no reference to the arguments – now pleaded in the interim relief procedure – relating to adverse effects from light and dust pollution and to the fire safety plan. The focus of the appellant's objections had been on their concern that the installation would breach Immission Control Law as regards noise effects.* ***There had been no reference in the appellant's objections to likely adverse effects of light and dust pollution or to the fire safety plan, even though the summary description of the project had clearly indicated to the average, non-expert individual that these kinds of effects might occur. Indeed, the summary description made available had addressed these specific points under separate items the same way it had discussed the fire safety plan.*** *The appellant himself has conceded that he as objector during the consent procedure, based on the summary description he had inspected, 'primarily' had referred to the noise pollution issue – which is in fact the only point he made in his objections.* ***His only challenge to the view expressed by the Court of first instance that the documents made available also would have pointed to possible adverse effects from light and dust, is that due to his self-evident lack of experience with installations used in shredder plants he had been quite unable to appreciate any hints in the summary description that there might be other effects than those specifically mentioned, such as dust, light, odious smells or operational safety hazards. In our view, this argument must be rejected. This is because the documentation made available included a detailed study relating the emission and immission of dust; thus the appellant should have taken this kind of impact into consideration*** *(Application for consent, folder 2 of 5, No. 15).* ***Also, the documentation does provide details about the lighting plan. It indicates which parts of the installation are to be illuminated from what height and with what intensity*** *(Application for consent, folder 2 of 5, No. 10, p. 14 et seq.). Also, it should be self-evident even to a layperson that a waste treatment plant may cause odious smells. Lastly,* ***there is a detailed explanation of the fire safety plan in the explanatory document about the components of the installation*** *which was submitted in support of the application for consent (Application for consent, folder 1 of 5, No. 2, p. 51 et seq.).'*

72 This order clearly indicates that a member of the public concerned is required to itemize in his or her objections any and all possible adverse effects anticipated. The citizen thus effectively is obliged to study the complete documentation made available during the procedure for consent, including all technical studies supplied. As the order further makes clear, **this documentation encompassed 5 massive folders**; thus – assuming print on one side only – **the citizen in effect would have had to work his or her way through about 2,500 pages of documentation**. Even though the appellant had argued that due to his lack of technical expertise about shredder plants he had been unable to realize that there might be adverse effects from light, dust, odious smells or operational safety hazards, the Court considered such kinds of effect to be foreseeable from the documentation, since they had been the topic of technical studies.

73 It is submitted that an average prudent member of the public concerned is manifestly unable to meet such an unreasonably high burden of substantiation – let alone within the statutory two-week period for submitting objections.

74 But even where a member of the public concerned does itemize the type of immission anticipated, this will not necessarily be sufficient for him or her to retain their right to plead these points at trial. For instance, in its order of 9 June 2011 (22 B 10.2192 et al), Munich Superior Administrative Court noted that the plaintiff had submitted timely objections which had expressed concern about protection from vibration during the construction of a facility subject to Immission Control Law. Nevertheless, in the Court's view the objections did not entitle the plaintiff to a comprehensive examination of his concerns at trial, for (Munich Superior Administrative Court, ibid., para. 16, available from www.juris.de – emphases ours):

> *'**[The objections] do refer to protection from vibration; however they do not specifically argue that the turbines with their electrics and electronics would be particularly sensitive to vibration.** So as to retain their option of pleading their rights where necessary at trial, objectors by virtue of s. 10 subs. 3 cl. 4 of the Federal Immission Control Act must file timely objections. [...] For objections to be relevant, they must state not just the interests being relied on, but also the particular adverse effects on those interests; objections must indicate at least in general terms which kind of adverse effects are being anticipated (see Federal Constitutional Court, order of 8 July 1982, 61 BVerfGE 82, at 117/8; Federal Administrative Court, decision of 30 January 2008, 2008 Neue Zeitschrift fuer Verwaltungsrecht 678). **Thus the objector also must specifically state his claim that particular buildings or components of the installation – as the turbines in the case at hand – due to their electrics and electronics are particularly sensitive to vibration,** even more so since the operator himself will likely be the only person to be aware*

of such aspects (see, e.g., in this vein Federal Administrative Court, decision of 9 June 2010, 2010, 870 <juris para. 161>; Hamburg Superior Administrative Court, decision of 18 February 2010 – 1 D 599/08 <juris paras. 99 et seq.>). This kind of substantiation is not required only where a particular degree of sensitivity would seem to be self-evident, given the type of installation concerned. The plaintiffs have not demonstrated that this might be the case. ***As regard the turbines, they plaintiffs in their respective written objections only pointed to vibration likely causing damage such as cracks to the components themselves rather than to likely interference with the turbines' operation due to their electronics' sensitivity to vibration.*** *In this regard the competent authority had no reason to recognize that it was this kind of interference which the plaintiffs had concerns about.*

The plaintiffs were given a hearing on whether their objections might be precluded – an issue which the Court of first instance did not consider; they had sufficient opportunity to make observations in respect of the preclusion issue. ***Neither the fact that the allegations relating to the turbines' particular sensitivity to vibration were ventilated both at the oral hearing during the administrative procedure and at oral argument in the Court of first instance, nor the considerations that the competent authority must investigate the relevant facts ex officio and that it did impose conditions to protect the turbines from vibration, can call into question that the plaintiffs pleadings on this point are subject to preclusion*** *(see, on the latter consideration, also Munich Superior Administrative Court, decision of 27 October 2010 – 22 A 09.40058 <juris para. 22>)'*

75 This decision indicates that members of the public concerned in effect are obliged as early as in the administrative procedure to recognize in detail any conceivable effects on their rights and to itemize them in their objections. **Notably, preclusion of specific arguments has effect independent of whether the competent authority would have been required ex officio to consider the issue concerned; there will on no account be any judicial examination whether the way the authority dealt with the issue was appropriate.**

76 There have been many more decisions in which the German judiciary found specific arguments made by plaintiffs to be precluded due to the plaintiffs' failure to itemize the particular points in their objections (see, e.g., Munich Superior Administrative Court, order of 22 March 2012, 22 ZB 12.149 et al., paras. 12 et seq. – available from www.juris.de: plaintiffs' failure specifically to refer to health hazards resulting from bio-aerosols or airborne pathogens).

c) Case-law relating to preclusion pursuant to the Administrative Procedure Act

77 Also, the Courts apply an extensive interpretation of the general preclusion clause which is set out in the Administrative Procedure Act and meanwhile has been incorporated by reference in

practically all Special Planning Acts. When applying s. 73 subs. 4 cl. 1 of the (Federal) Administrative Procedure Act or the corresponding clause of a Laender Administrative Procedure Act, the Courts impose what in effect is an unreasonably high burden of substantiation on members of the public concerned who wish to retain their entitlement to judicial review of development consent for projects having a significant effect on the environment.

78 For instance, Munich Superior Administrative Court considered private citizen plaintiffs' argument at trial precluded that the effects of the project concerned would jeopardize the economic viability of their organic farm. The claim in plaintiffs' objections, that the route chosen for the proposed road would destroy the most important and most valuable part of their agricultural lands, in the Court's view was insufficient to demonstrate a clear and present risk to the farm's viability. What the plaintiffs should have done to avoid their claim being precluded is explain the economic situation of their farm both prior to and after the interference with their lands, or itemize the affected lands in relation to their complete lands as held in ownership, under long-term lease and under short-term lease (Munich Superior Administrative Court, order of 21 October 2009, 8 ZB 09.1469, para. 7; see also Munich Superior Administrative Court, order of 17 August 2010, 8 CS 10.303, paras. 20 et seq.).

79 Bautzen Superior Administrative Court in its order of 17 July 2012 (4 A 708/10, para. 7) clarified that objections submitted prior to the start of the statutory objection period are subject to preclusion. Thus where a citizen likely to be affected submits a comment prior to the start of the objection period, this will not be considered a relevant objection. The relevant section of the opinion reads:

> *'In the interest of legal certainty and in view of the legislature's intention to expedite administrative procedures only objections filed during the relevant period can be taken into consideration. Only this kind of strictly observed formality can ensure the respect these interests are due and can avoid a lack of clarity about the range of the relevant objectors and the content of the relevant objections as well as a need for preliminary consultation of other records some of which might be held by different authorities (Order of 1 April 2005 – 9 VR 6/05 – juris para. 5; see also Mecklenburg-Vorpommern Superior Administrative Court, judgment of 22 March 201 – 5 K 16/10 – juris para. 146).* ***A reference to comments made in a previous procedure or in relation to a previous stage of the planning process does not result in these comments becoming part of relevant objections within the meaning of s. 73 subs. 4 cl. 1 of the Administrative Procedure Act*** *(Federal Administrative*

Court, judgment of 27 August 1997, 1998 Neue Zeitschrift fuer Verwaltungsrecht Rechtsprechungs-Report 290, juris paras. 26 et seq.).'

80 This case stands for the principle that a citizen as well as a municipality cannot, by reference to comments submitted during a previous procedure or in relation to a previous phase of the planning process, turn these comments into a relevant objection. **Rather, what citizens and municipalities must do is submit new objections in each stage of a procedure which match the relevant documents made available for inspection.**

d) Case-law on preclusion in Railway Planning Law

81 Railway Planning Law is another area where the German judiciary uses an extensive interpretation of the rules on preclusion (see, e.g. Munich Superior Administrative Court, judgment of 17 July 2009, 22 A 09.4006, paras. 31/2 - available from www.juris.de - applying the preclusion rules to a municipality's pleading at trial that its right to the enjoyment of its property had been infringed by the projected railway line; Kassel Superior Administrative Court, judgment of 17 November 2011, 2 C 2165/09, paras. 54 et seq.).

82 Applying the rules on preclusion, Munich Superior Administrative Court refused to hear an individual plaintiff's pleading at trial that the additional costs likely resulting from the project would endanger the economic viability of the plaintiff's farm - a situation particularly likely to affect part-time farmers like the plaintiff who were unable to spend much time working their farm. In the Court's view, this pleading which was based on specific economic dispositions or - as the plaintiffs had put it - particular economic benchmarks - was inadmissible, since the plaintiffs had not included it in their objections submitted during the administrative procedure (Munich Superior Administrative Court, judgment of 7 October 2009, 22 A 09.40002, citing Federal Administrative Court, decision of 22 September 2004, [2004] Neue Zeitschrift für Verwaltungsrecht 219/220).

83 In a subsequent decision, Munich Superior Administrative Court clarified that preclusion rules apply even to those points of fact and law which the competent authority is required to consider ex officio, no matter whether these points were the topic of objections from members of the public concerned. The Court believed that preclusion rules such as section 18a No. 7 of the General Railways Act (Allgemeines Eisenbahngesetz) did not impose limitations on the authority's duty to investigate the relevant facts and to strike an appropriate balance between the interests affected; what the rules on preclusion did, though, was remove the right of persons affected to mount a legal challenge to the authority's decision (Munich Superior Court, summary

judgment of 27 October 2010, 22 A 09.40058, para. 22 - available from www.juris.de, citing Federal Administrative Court, order of 1 April 2005, 9 VR 5/09 et al.).

84 Admittedly, the Federal Administrative Court has frequently paid lip-service to a an ostensible rule against asking too much in terms of substantiation from non-expert objectors; as a rule objectors should not be expected to make submissions which take significant technical expertise to prepare. But at the same time, the Court has held, for instance, that objectors as early as during the administrative procedure are expected to assess whether the traffic estimation underlying an expert study on the projected rail line's noise effects had used an appropriate forecast period and whether the projected number of trains had been set too low (Federal Administrative Court, judgment of 26 May 2011, 7 A 10/10, paras. 30 et seq. - available from www.juris.de). The relevant section of the judgment reads:

> *'But the plaintiff could have been expected to make submissions on this point as early as during the objection period, because the planning documents made available provided sufficient reason for her to do so: Annex 13.5 to the study on noise effects clearly stated that the traffic forecast period was 2015, and which number of trains the calculations were based on. This information would have been sufficient for the plaintiff to challenge the projected traffic data. In our view and contrary to what the plaintiff is asserting, this is not asking too much of non-expert plaintiffs in terms of substantiation. In order to retain her rights, the plaintiff would not have been obliged as early as during the objection period to mount a detailed challenge to the traffic estimation, in particular as to whether the 'operating programme 2015' proposed for the y-line was plausible. However, she would have been both able and required to indicate that she considered the forecast period to be unduly brief and the projected number of trains too low, or respectively that she felt unable to assess from the documents available whether the projected number of trains was plausible. Thus she at least would have been required to call into question in lay terms the projected noise level likely to result from the project. There is no reference whatever to this point in the written objections of 21st March 2007, though.'*

85 The Communicant has serious doubts as to whether a private individual, without having commissioned expert legal and technical advice, is capable of ascertaining whether the projection about the amount of noise likely to be caused by a railway project is plausible. This also applies to small municipalities like the Communicant who lack specialist legal and technical departments. Non-expert members of the public concerned are simply unable to digest the voluminous and highly technical documentation made available so as to ascertain the likely impact of a project on their legal rights. Since the case-law requires them to do just this,

members of the public concerned effectively will have to commission expert legal and technical advice as early as during the administrative procedure, so as to ensure that no relevant aspects are overlooked and their legal rights can be safeguarded. In addition, any experts brought in only have an unreasonably short period of time to provide a thorough and in-depth analysis of the documents made available.

e) Case-law on preclusion rules in Energy Law

86 Energy law is another area where the judiciary uses an extensive interpretation of the relevant preclusion rules. In particular, pleadings at trial relating to specific issues of environmental protection, such as habitat and species protection, have been held to be precluded. The judgment Munich Superior Administrative Court rendered on 19 June 2012 (22 A 11.40016 et al., para. 24 - available from www.juris.de) is a good example for this practice:

> *'Preclusion applies to all plaintiffs' pleadings at trial which relate to protection of species (prohibitory clauses in section 44 subsection 1 of the Federal Conservation of Nature Act), to the protection of the 'Untere Illerauen' Special Area of Conservation between pylon no. 27 A and pylon no. 28 A, to protection of drinking water near pylon sites no. 29 A / 30 A and 31 A pursuant to the ordinance made by the Neu-Ulm district authority on 10th July 1981 to establish the 'Illeraue' water protection area, or to nature preservation pursuant to the ordinance made by Neu-Ulm district on 18th November 1997 to establish the 'Iller Alluvial Forest between Neu-Ulm and Kellmünz' nature preserve. Preclusion also applies with regard to the plaintiffs' submissions on noise pollution and on special economic features of their farms and the project's likely impact in this regard.*

87 This judicial opinion clearly indicates that any and all plaintiffs were refused an opportunity to raise at trial any issues of environmental protection. The risk of unlawful administrative decisions being left to stand thus increases significantly. This is because even where the administrative decision infringes the law on species protection, on protection of a Special Area of Conservation, on preservation of nature, on noise pollution or on protecting the viability of farms, the Court will have no opportunity to quash the decision, since due to the preclusion rules applying no plaintiff has the right to raise these issues in Court.

f) Case-law on preclusion rules in Road Planning Law

88 Procedures relating to road construction or road expansion projects are another area where preclusion rules play an important part.

89 The Federal Administrative Court's judgment relating to the expansion of the A3 Motorway near Würzburg (Federal Administrative Court, judgment of 3 March 2011, 9 A 8/10) is a good example

for how the judiciary applies preclusion in this area. In this judgment, the Court developed specific requirements as to substantiation applicable to citizens' objections with regard to European Union Habitats Protection Law. The relevant section of the Court's opinion reads:

> *'They [i.e. the plaintiffs] also failed to submit admissible objections about the protection of Special Areas of Conservation and of species set out in EU law. Admittedly,* ***the plaintiffs mention a reference in the explanatory report*** *to the effect that the 'South 1' route variant would avoid the adverse impact on the 'Bromberg-Rosengarten' Special Area of Conservation / nature conservation area which in turn would definitely occur as a result of the 'South 1 /B beige' route variant being chosen; they conclude from this that there is a compelling reason pursuant to Art. 6 paragraphs 3 and 4 of the Habitats Directive to prefer the 'South 1' route variant'. However, this submission* ***fails to raise properly the compatibility with Habitats Law of the route variant for which the administrative authority chose to grant planning consent.'***

90 The paragraph just cited clearly states that the plaintiffs in their objections did refer to Habitats Law. However, they only did so in the context of the route variants discussed during the administrative procedure. What was missing, though, was an express statement that the route variant ultimately chosen had an adverse impact on Special Areas of Conservation. This was sufficient for the Court to apply the preclusion rules with regard to this point. **What the citizens thus effectively are required to have is the knowledge that the Habitats Directive can affect the project's legality in several respects.** No matter the Courts' constant lip-service to not placing too high a burden of substantiation on citizens, what this does is overextend this burden beyond all notions of reasonableness. It should not come as a surprise that the Federal Administrative Court in this case once again pointed to the effective availability of six weeks for the study of the available documents and for drafting objections, and for this reason refused to entertain concerns that the objection period might be unreasonably short. Despite the plaintiffs having requested it to refer this issue to the European Court of Justice, the Federal Administrative Court declined to do so (ibid., at paras. 38 et seq.).

91 What is striking is the way in which the case-law has become ever more restrictive and now expects citizens as early as during the objection period to make a highly specific submission on Conservation Law, so as to retain their right to judicial review. The Federal Administrative Court's order of 4 August 2011 (9 B 33/11, para. 2 - available from www.juris.de) is another good example for this:

> *'Where, for instance, the documents made available presented an in-depth discussion of conservation issues - like in the case at hand - , a landowner*

who is directly affected by the project can be expected in his objections to notify the authority at least in lay terms of the areas of fauna and flora whose study he - in view of his land being affected - still considers insufficient.

The plaintiffs' objections only in general terms mention the destruction of nature with its fauna and flora; in view of the documents made available this falls far short of what must be required. In view of the studies already prepared this general objection did not provide a reason for the planning authority to engage in a more detailed examination of the project with regard to specific species of animals and plants.'

92 The Communicant submits that the Federal Administrative Court is acting in a self-contradictory manner in requiring that a landowner, so as to retain his right of action, notify the authority in lay terms of the areas of flora and fauna whose study he - in view of his land being affected - still considers insufficient. Without having commissioned expert advice, a non-expert objector simply cannot be expected to find out from the ecological studies made available which areas of fauna and flora have been discussed in an insufficient degree of detail. This is another example of the Courts imposing too high a burden of substantiation.

93 Road planning law is another area with a high number of cases where the Courts due to preclusion having been applied effectively failed to examine whether the project concerned complied with European Habitats Law (see, e.g. Federal Administrative Court, judgment of 23rd March 2011, 9 A 9/10, paras. 22 et seq. - available from www.juris.de; Münster Superior Administrative Court, judgment of 13 April 2011, 11 D 37/10 AK, paras. 63 et seq., in particular para. 68 - available from www.juris.de: held that an objection was insufficient which stated that 'the proposed development consent failed to consider the requirements for balancing adverse impacts and compensation measures' and that it 'was in breach of conservation law principles').

g) Concluding remarks

94 To sum up, the German judiciary will regard preclusion to apply with regard to every single argument a member of the public concerned seeks to make at trial to challenge the development consent for a project likely to have significant impact on the environment, unless exactly the same argument has been made in that member's objections during the administrative procedure.

95 **Preclusion has been held to apply to any claims that the law has been breached, be it in regard to domestic environmental law, to national rules implementing EU environmental directives, or to directly applicable EU law. Even where a plaintiff who is not a nongovernmental organization promoting environmental protection does under German law have the right to**

plead breaches of environmental law at all, he constantly is at risk that his pleadings will be held to be subject to the preclusion rules.

96 This case-law is not about a few isolated one-off examples, but rather is a consistent, well-established, universally applicable body of law.

97 The preclusion rules also apply to other areas which we chose not to present in detail, such as Airport Planning Law and Water Resources Management Law.

98 The only claim not subject to preclusion rules is the one relating to the administrative authority's lack of subject-matter competence (this was clarified by the Federal Administrative Court, judgment of 14[t] July 20111, 9 A 14/10, para. 12; Lüneburg Superior Administrative Court, judgment of 22 February 2012, 7 LC 83/10, para. 87).

99 It is quite rare for a plaintiff to succeed in presenting as early as during the administrative procedure all his concerns later to be raised at trial, and in avoiding a limitation of the topics subject to judicial review (for examples of successful plaintiffs, see Federal Administrative Court, judgment of 3 May 2011, 7 A 9/09, paras. 28 et seq.; Munich Superior Administrative Court, judgment of 17 February 2011, 22 A 09.40060, paras. 35 et seq.)

100 In most cases, the reason why preclusion was held not to apply was not the high quality of the objections submitted, but rather some error committed by the administrative authority in the context of making the documents available for inspection - in other words a lack of the formal conditions for applying the preclusion rules (see, e.g., Koblenz Superior Administrative Court, judgment of 26 July 2011, 1 A 10473/07, paras. 97 et seq.; Lüneburg Superior Administrative Court, judgment of 26 October 2011, 7 KS 4/10, paras. 34; Munich Superior Administrative Court, judgment of 22 December 2011, 8 BV 10.1795, paras. 21 et seq., in particular at para. 26).

101 Notably, within the last six years the Federal Administrative Court as well as the Superior Administrative Courts have rendered a large number of additional decisions in which the plaintiffs' pleadings relating to the formal or substantive legality of a project were regarded as precluded on the grounds that the plaintiff had failed to raise exactly the same point in sufficient detail during the administrative procedure. See, e.g.:

- Federal Administrative Court, order of 30 September 2008, 7 VR 1/08, para. 13;
- Munich Superior Administrative Court, judgment of 4 November 2008, 8 CS 08.2622, para. 9;

- Münster Superior Administrative Court, judgment of 21 January 2009, 11 D 41/06 AK, paras. 37 et seq.;
- Federal Administrative Court, summary judgment of 29 January 2009, 7 A 1/08, para. 20;
- Münster Superior Administrative Court, judgment of 11 February 2009, 11 D 45/06 AK, paras. 37 et seq.;
- Munich Superior Administrative Court, order of 15 April 2009, 8 ZB 08.3146, paras. 8 et seq.;
- Federal Administrative Court, order of 23 June 2009, 9 VR 1/09, paras. 5 et seq.;
- Kassel Superior Administrative Court, judgment of 16 November 2009, 6 C 1005/08, paras. 112 and 139;
- Lüneburg Superior Administrative Court, judgment of 21 October 2009, 7 KS 32/08, para. 39;
- Koblenz Superior Administrative Court, judgment of 20 January 2010, 8 C 10357/09, paras. 36 and 42;
- Munich Superior Administrative Court, judgment of 29 January 2010, 22 A 09.40005, paras. 17 et seq.;
- Greifswald Superior Administrative Court, order of 10 March 2010, 5 M 153/09, paras. 49 et seq.;
- Bautzen Superior Administrative Court, order of 21 April 2010, 1 B 299/09, paras. 6 et seq.;
- Schleswig Superior Administrative Court, order of 28 April 2010, 1 MR 6/10, paras. 4 et seq.;
- Federal Administrative Court, order of 11 May 2010, 7 VR 2/09, paras. 7 et seq.;
- Weimar Superior Administrative Court, judgment of 19 May 2010, 1 O 7/09, paras. 27 et seq.;
- Koblenz Superior Administrative Court, order of 11 June 2010, 8 B 10618/10, paras. 6/7;
- Bautzen Superior Administrative Court, order of 23 July 2010, 4 B 444/09, paras. 74 et seq.;
- Munich Superior Administrative Court, judgment of 18 October 2010, 22 A 09.40066, paras. 34 et seq.;
- Magdeburg Superior Administrative Court, order of 2 November 2010, 3 R 375/10, paras. 6 et seq.;
- Federal Administrative Court, 1 December 2010, 9 A 25/09, para. 13;

- Lüneburg Superior Administrative Court, order of 29 June 2011, 7 MS 73/11, para. 25 et seq.;
- Munich Superior Administrative Court, order of 17th August 2011, 8 ZB 11.249, paras. 11 et seq.;
- Magdeburg Superior Administrative Court, judgment of 19 October 2011, 3 K 374/10, paras. 18 et seq.;
- Munich Superior Administrative Court, order of 4 May 2012, 22 AS 12.40045, paras. 17 et seq.;
- Bremen Superior Administrative Court, order of 27 July 2012, 1 B 155/12, para. 25.

102 Our present submission refrains from even referring to the very large body of cases decided in the Administrative Courts of first instance which have followed the same approach to applying the rules on preclusion.

IV. Breach of the Convention by the German preclusion rules and their application

103 It is submitted that the German legal system's emphasis on preclusion as a whole, i.e. the existing preclusion rules and the way German Courts apply them to projects within the scope of the Convention is in breach of the Convention. In our view this conclusion is virtually inevitable, given the role of the preclusion rules within the domestic procedures, these procedures' way of operation and the special characteristics of these procedures.

1. Lack of legal basis in the Convention for the preclusion rules

104 The Committee has explained that State Parties to the convention are

> *'not obliged to literally transpose the text of the Convention into [their] national legislation. However, when using its discretion in designing its national law, the Party concerned should not impose additional requirements that restrict the way the public may realize the rights awarded by the Convention, if there is no legal basis in the Convention for imposing such restrictions.'* (Findings in ACCC/C/2008/31 (Germany), para. 77)

105 On its terms, the Convention fails to provide a legal basis for the enactment of preclusion rules. In particular, article 9, paragraph 2, subparagraph 3 of the Convention cannot be considered such a legal basis. What this provision does is authorize Parties to retain any existing preliminary review procedure before an administrative authority and any existing requirement for members of the public to make use of administrative review procedures prior to having recourse to judicial review procedures within the meaning of article 9, paragraph 2, subparagraph 1 of the Convention. What this provision does not do is authorize Parties to limit the range of arguments

plaintiffs can rely on at trial. What this provision also does not do is permit Parties to make access of the public concerned to this judicial review procedure conditional on prior participation by the public concerned in the original administrative procedure for environmental decision-making within the meaning of article 6 of the Convention.

106 The Compliance Committee also has clarified that

> *'[a]rticle 9, paragraph 2, requires each Party to ensure access to review procedures in relation to any decision, act or omission subject to article 6 of the Convention. The range of subjects who can challenge such decisions may be defined (limited) by the Party in accordance with the provisions of article 2, paragraph 5 and article 9, paragraph 2(a) and (b) of the Convention. However, the Party may not through its legislation or practice add further criteria that restrict access to the review procedure, for example by limiting the scope of arguments which the applicant can use to challenge the decision.' (Findings and Recommendations with regard to communication ACCC/C/2008/31, para. 78)*

107 As has been demonstrated above (*supra*, paras. 41 *et seq.*, 67 *et seq.*, 77 *et seq.*, 81 *et seq.*,) the German rules on preclusion effectively limit the range of arguments available at trial to those which the plaintiff has raised in sufficient detail during the administrative procedure. At the same time, the preclusion rules cannot be considered to be provisions which in accordance with the provisions of article 9, paragraph 2(b) of the Convention limit the range of subjects who can challenge environmental decisions. This is because article 9, paragraph 2 of the Convention relates to potential plaintiffs' standing, i.e. to the *admissibility* of an action for judicial review. By contrast, a member of the public concerned whose objections have been ruled to be caught by the preclusion rules nevertheless is considered to have standing. According to German judicial doctrine, the fact that preclusion applies affects the *merits* of the plaintiff's case (Federal Administrative Court, order of 12 February 1996 – 4 A 38/95 –, paras. 22 – 25, available from www.juris.de), i.e. the question whether the plaintiff's action is well founded. Only where a plaintiff failed to submit any objections whatever, will the courts consider the subsequent action inadmissible on the grounds that there obviously has not been an impairment of the plaintiff's rights (see, e.g., Munich Superior Administrative Court, 1979 Deutsches Verwaltungsblatt 673). For these reasons, the Communicant submits that there is no legal basis in the Convention for the enactment of the preclusion rules. Rather, these rules are in breach of the principles set out in the Compliance Committee's Findings with regard to communication ACCC/C/2008/31, as just quoted.

2. Unreasonably short period for filing objections

108 The Communicant further submits that the commonly applicable two-week period for filing objections after the end of the one-month period for inspecting the available documents is unreasonably short and unfairly limits the opportunity for the public concerned to participate in the consent procedures.

109 The communicant submits that this constitutes a breach of article 6, paragraph 3 of the Convention, since the German provisions on public participation do not 'include reasonable timeframes for the different phases', and fail to allow 'sufficient time [...] for the public to prepare and participate effectively during the environmental decision-making.'

110 As has been demonstrated above (*supra*, e.g. at paras. 71 *et seq.*, 84 *et seq.*, 88 *et seq.*), the two-week period for filing objections imposes an unreasonably high burden of substantiation on prospective objectors, in particular where they intend to make a case that the environmental impact assessment or the assessment as to whether the project at issue complies with Habitats Law is insufficient; this is because objectors need to study and digest the available documents thoroughly in order to prepare sufficiently detailed objections. It takes a certain degree of expertise just to find the weak points and flaws of the environmental documents prepared in support of a project.

111 **Contrary to what some German Courts have indicated, it is only the two-week period for filing objections rather than the complete one-month-plus-two-weeks period for inspection and filing objections which is relevant for deciding whether the preclusion regime allows sufficient time for public participation.** This is because members of the public concerned must not be placed at a disadvantage nor effectively be discriminated against for having had to defer until the very end of the inspection period the inspection of the available documents.

112 Thus the relevant question is whether a **two-week period for filing objections** is sufficiently long, to provide members of the public concerned an opportunity to prepare appropriately detailed objections.

113 In this context it is appropriate to note that the judicially developed requirement to substantiate any objections relating to an environmental impact assessment under Directive 2011/92/EU or to an assessment under the Habitats Directive 92/43 imposes an unreasonably high burden of substantiation, which non-expert citizens as well as small local government bodies – due to their lack of ecological expertise – are quite unable to meet. Whereas even non-expert citizens likely

would notice the complete absence of requisite environmental assessments, they most probably would be unable to realize that such assessments fail to cover all of the relevant points.

114 Thus the German judiary imposes a manifestly unreasonable burden on members of the public concerned by requiring that these persons whithin two weeks after the end of the inspection period thoroughly study the available documents, analyse them, check them for omissions and flaws and raise any omissions and flaws in a high degree of detail.

115 Therefore the German Courts miss the point – namely that expecting members of the public concerned to spot flaws in the environmental assessments is asking far to much, owing to these documents' size and complexity – when insisting that for objections to be admissible they only need to explain in lay terms why the environmental assessments are flawed, which animal and plant species have not been discussed at all, or which sections of the assessment lack the requisite degree of detail.

116 The Communicant submits that the obligation on objectors to notice and raise within a two-week period any flaws of environmental impact assessments or Habitats Law assessments is quite impossible to meet for non-expert citizens. It effectively requires them to commission legal and expert advice just to file their objections. Thus the unreasonably short period for filing objections undermines the Convention's objective of improving public participation. This is because effectively **it is only the expert public rather than the public concerned who is able to participate in consent procedures.**

3. Mutually independent rights of participation and access to justice for members of the 'public concerned'

117 The Communicant further submits that the preclusion regime breaches article 9, paragraph 2, read in combination with article 6 of the Convention in that it makes access to a review procedure for members of the public concerned conditional on their previous participation in the environmental decision-making procedure. Article 9, paragraph 2, read in combination with article 6 of the Convention, by contrast, create for the public concerned separate rights of participation in environmental decision-making procedures and of access to a review procedure. Importantly, the right of access to a review procedure does not derive from previous participation in the administrative decision-making procedure, but follows from the plaintiff being a member of the 'public concerned'.

118 Admittedly, the Communicant cannot point to any case-law of the Compliance Committee which in this manner develops the principle of the various rights under the Convention being mutually independent.

119 In the absence of specific Compliance Committee rulings on this point, the Communicant would like to point to the judgment delivered by the Court of Justice of the European Union on 15 October 2009 (C-263/08 – *Djurgarden*). This judgment provides a detailed discussion of the relationship between the participation of the public in administrative consent procedures and the right of access to justice pursuant to Directive 85/337/EEC, as amended by Directive 2003/35/EC, codified by Directive 2011/92/EU. Significantly, this discussion relates to article 10a of Directive 85/337/EEC (i.e. article 11, paragraph 1 of Directive 2011/92/EU) which implements article 9, paragraph 2 of the Convention by means of a verbatim copy of the Convention's wording. Thus the arguments put forward in the CJEU's *Djurgarden* judgment and in Advocate General Sharpston's opinion ultimately are a persuasive interpretation of the Convention itself and provide support for the Communicant's view that the German preclusion regime is incompatible with article 9, paragraph 2, read in combination with article 6 of the Convention.

a) Separate right of access to a review procedure for the 'public concerned'

120 Importantly, the Djurgarden judgment clarified that the right of access to a review procedure under article 10a of the Directive (i.e. the equivalent of article 9, paragraph 2 of the Convention) is completely separate from any opportunity for participation in environmental decision-making procedures under article 6 of the Directive (i.e. the equivalent of article 6 of the Convention). The rights to participation and to access to a review procedure are mutually independent. As the Luxemburg Court put it,

> *'participation in an environmental decision-making procedure [...] is separate and has a different purpose from a legal review, since the latter may, where appropriate be directed at a decision adopted at the end of that procedure. Therefore, participation in the decision-making procedure has no effect on the conditions for access to the review procedure. (Court of Justice of the European Union, Case C-263/08, judgment of 15 October 2009, para. 38)*

121 Thus the right of access to a review procedure must not be denied on the grounds that the plaintiff had an opportunity to participate in the administrative decision-making procedure, or on the grounds that the plaintiff failed to participate properly in the administrative procedure. As Advocate General Sharpston clarified,

'access to the courts does not derive from an earlier participation in the administrative stage. Rather, the wording of article 10a [i.e. the equivalent of the Convention's article 9, paragraph 2] indicates that an environmental protection organisation passes through the 'gateway' to the courts if it meets the requirements of article 1(2) [i.e. the equivalent of the Convention's article 2, paragraph 5] and acquires the status of 'the public concerned'. (Opinion of 2 July 2009 in Case C-263/08, para. 44)

122 As the Advocate General further pointed out (*ibid.*, para. 49), once an environmental protection organisation has acquired the status of the 'public concerned', it has 'both the right to be informed and to participate in the adnminstrative stage and the right of access to the courts to challenge the decisions of the administrative authorities.'

123 The Durgarden judgment and even more so the Advocate-General's opinion demonstrates that all three rights conferred by the Convention are mutually independent. In particular, the right of access to a judicial review procedure must not be made conditional on the plaintiff environmental organisation's previous participation in the decision-making procedure pursuant to article 6 of the Convention. 'What is important is that the organisation meets the definition of the 'public concerned', not whether or not it participated in a particular stage in the procedure.' (Advocate General Sharpston, *ibid.*, para. 71). There is no conceivable reason why the principle of all rights under the Convention being mutually independent should not apply also to members of the 'public concerned' who are not environmental protection organisations.

b) Abolition by the preclusion rules of the Convention rights' mutual independence

124 The German rules on preclusion are in breach of article 9, paragraph 2, read in combination with article 6 of the Convention, because they effectively remove the mutual independence of the rights conferred by the Convention. As has been demonstrated above, the preclusion rules make the exercise of access to a review procedure conditional on the plaintiff having filed sufficiently detailed objections during the participation at the administrative stage. This is the exact opposite of mutual indepence.

4. The preclusion regime's general lack of fairness

125 The Communicant further submits that the preclusion regime does not comply with article 9, paragraph 4 of the Convention in that it lacks the requisite fairness. In its Findings and Recommendations with regard to communication ACCC/C/2008/33, para. 135, the Compliance Committee explained the meaning of the term 'fair' in article 9, paragraph 4 of the Convention as follows (emphasis ours):

'[...] The Committee also notes the Court of Appeal's judgment in Morgan v. Hinton organics which held that the principles of the Convention are 'at most' a factor' which it 'may' (not must)' have regard to in exercising its discretion', [citation omitted] 'along with a number of other factors, such as fairness to the defendant'. [citation omitted] ***The Committee notes in this respect that 'fairness' in article 9, paragraph 4 refers to what is fair for the claimant, not the defendant.'***

126 Article 9, paragraph 4 of the Convention thus requires state parties to ensure in particular that the procedures for judicial review of decisions subject to the provisions of article 6 are fair for the claimant, i.e. for the members of the public concerned. As has been demonstrated above (*supra*, paras. 21 *et seq.*), the preclusion rules apply to any decision subject to the provisions of article 6. As has also been explained above (*supra*, paras. 71 ff.), the preclusion regime grants the public concerned a one-month period to inspect the usually large amount of documents produced in support of an application for development consent, and an unreasonably short two-week period for filing objections. We further have shown that it imposes an unreasonably high burden of substantiation on the public concerned (*supra*, paras. 41 *et seq.*, 71 *et seq.*), and that it limits the range of arguments the public concerned can rely on at trial to those which have been raised in sufficient detail during the objection period in the administrative stage (*supra*, paras. 58 *et seq.*). We submit that for these reasons the preclusion regime renders the judicial review procedures available in Germany inherently unfair to the members of the public concerned. Therefore it does not comply with article 9, paragraph 4 of the Convention. And the fact that according to the view held by the German judiciary (Federal Constitutional Court, order of 8 July 1982 – 2 BvR 1187/80 –, 61 BVerfGE [i.e. Federal Constitutional Court Reports] 82, at 114) the preclusion rules strike a fair balance between the legal rights of the applicant for a project and those of the public concerned cannot restore the preclusion regime's compatibility with article 9, paragraph 4. This in our view is because article 9, paragraph 4 of the Convention requires fairness for the members of the public concerned, not for the applicant for the project.

5. Summary and motion

127 To sum up, the Communicant believes that Germany, by enacting and applying the preclusion rules in the manner set out above, in several respects is in non-compliance of the Convention.

128 **Therefore the Communicant moves for the Compliance Committee to find that:**

1. **Germany does not comply with article 9, paragraph 2 of the Convention, in that the German preclusion rules limit the arguments members of the public concerned**

can rely on during the judicial review procedure to those raised in sufficient detail in the administrative stage.

2. **Germany does not comply with article 6, paragraph 3 of the Convention in that Germany sets in administrative procedures subject to the provisions of article 6, paragraph 1, clauses (a) and (b), a period of one month for informing the public and a two-week period for the public to participate during the environmental decision-making.**

3. **Germany does not comply with article 9, paragraph 2, read in combination with article 6 of the Convention in that German law makes access for the public concerned to the judicial review procedure conditional on previous participation in the administrative decision-making on development consent.**

4. **Germany does not comply with article 9, paragraph 4 of the Convention in that the preclusion regime, as applied by the German judiciary, renders the judicial review procedure inherently unfair for the public concerned.**

Part 2: Unlawfully restricted scope of permissible arguments for members of the public concerned

129 In this part of the Communication we will argue that Germany does not comply with article 9, paragraph 2 of the Convention in two additional respects: Firstly, the German judiciary has consistently held that the only breaches of law recognized environmental organizations may plead at the merits stage of an admissible review procedure are those which relate to legal provisions promoting environmental protection. Secondly, the German judiciary also has consistently held that the only breaches of law which other members of the public concerned may plead at the merits stage of an admissible review procedure are those which relate to legal provisions conferring individual public law rights on the plaintiff.

130 This part of the Communication thus is about the scope at the merits stage of permissible arguments relating to the procedural and substantive legality of administrative environmental decisions.

I. Relevant Provisions of the Convention

131 This part of the Communication will argue a violation of article 9, paragraph 2 of the Convention. For the wording of this clause and for relevant clauses from the Convention's preamble, please refer to paragraphs 11 and 14, *supra*.

II. Relevant Provisions of German Law

132 Section 42 of the Code of Administrative Court Procedure (*'Verwaltungsgerichtsordnung'*) reads:

> *'(1) The rescission of an administrative act (action for annulment) as well as sentencing to issue a rejected or omitted administrative act (enforcement action) can be requested by means of an action.*
>
> *(2) Unless otherwise provided by law, the action shall only be admissible if the plaintiff claims that his / her rights have been violated by the administrative act or its refusal or omission.'*

133 Insofar as it is relevant, section 113 of the Code of Administrative Court Procedure reads:

> *'(1) Insofar as the administrative act is unlawful and the plaintiff's rights have been violated thereby, the Court shall rescind the administrative act as well as any ruling on an administrative appeal.*
>
> *[...]*

(5) Insofar as the refusal or omission of the administrative act is unlawful and the plaintiff's rights have been violated thereby, the Court shall announce the obligation incumbent on the administrative authority to issue the requested official act if the case is ripe for adjudication. Otherwise it shall announce the obligation to issue a ruling to the plaintiff which shall take the Court's legal view into consideration.

134 As a matter of principle, in accordance with section 42 of the Code of Administrative Court Procedure actions will be admissible only if the plaintiff makes a plausible claim that his / her own individual public law rights have been violated. The 'impairment of rights doctrine' ('Schutznormtheorie') which was the subject–matter of Communication ACCC/C/2008/31 thus operates initially in the admissibility stage. This is meant to rule out actions being brought by persons who have no individual relation to the subject-matter at issue, i.e. to rule out actio popularis. Once the action is considered admissible, though, there are at the merits stage various restrictions of the scope of permissible arguments.

135 The basic provision restricting the permissible arguments in the merits stage is section 113 of the Code of Administrative Court Procedure (*supra*, para. 133). This clause in accordance with the 'impairment of rights doctrine' stipulates that a court will consider an action to be well founded only insofar as the administrative act is unlawful and the plaintiff's own individual public law rights have been violated thereby. Thus plaintiffs challenging environmental decisions within the meaning of article 6 and article 9, paragraph 2 of the Convention only are permitted to raise in the merits stage breaches of those provisions of law which confer rights on individuals. The impairment of rights doctrine in the same way applies where an administrative act has been refused or omitted (enforcement action).

1. Organizations promoting environmental protection

136 In accordance with the principles just explained, organizations which promote environmental protection may in the merits stage of an action argue an infringement of their right to enjoyment of their property under article 14, paragraph 1 of the Basic Law, insofar as they are owners or leaseholders of land. Other than this, they may only argue a violation of those legal provisions which a specific piece of legislation authorized them to rely on:

137 Insofar as it is relevant, section 64 of the Federal Conservation of Nature Act ('Bundes-Naturschutzgesetz' reads:

'Insofar as section 1, subsection 3 of the Environmental Appeals Act does not provide otherwise, and without its own rights having been violated, a recognized conservation association may file actions in accordance with the Code of Administrative Court Procedure to challenge decisions within the meaning of section 63, subsection 1, nos. 2 through 4, and subsection 2 nos. 5 through 7, where the association

1. asserts that the decision breaches provisions of this Act, of regulations adopted or continuing to have effect on the authority of this Act, of state conservation law, or of other laws which have to be followed when taking the decision and which are intended to at least also promote considerations of conservation and landscape management,

2. is affected in its tasks and activities as set forth in its statutes insofar as its official recognition refers thereto, and

3. was entitled to participate in accordance with section 63 subsection 1 nos. 2 through 4 or with subsection 2 nos. 5 through 7, and either made a substantive comment or was not offered an opportunity to comment.'

138 Insofar as it is relevant, section 1 of the Environmental Appeals Act (*'Umwelt-Rechtsbehelfsgesetz'*) reads:

'(1) This Act applies to actions to challenge

1. decisions within the meaning of section 2, subsection 3 of the Environmental Impact Assessment Act for the approval of projects which pursuant to

a) provisions of the Environmental Impact Assessment Act,

b) provisions of the Regulation on Environmental Impact Assessment of Mining Projects, or

c) provisions of state law

may be subject to an obligation to carry out an Environmental Impact Assessment (EIA);

2. Permits for installations which in column c) of Annex 1 of the Regulations about Installations Requiring a Permit have been marked with the letter 'G'; decisions in accordance with section 17, subsection 1a, of the Federal

Immission Control Act; permits in accordance with section 8 of the Water Management Act for uses of a water body which relate to projects within the meaning of Directive 2010/75/EU of the European Parliament and of the Council of 24 November 2010 on industrial emissions (Integrated Pollution Prevention and Control) (Recast) (O.J. L334 of17 December 2010, p. 17); as well as plan approvals for landfills in accordance with section 35 of the Recycling Management Act.

[...]

(3) Insofar as plan approvals within the meaning of subsection 1, clause 1, nos. 1 and 2 are subject to challenge in accordance with this Act, section 64 of the Federal Conservation of Nature Act shall not apply.

139 The decisions which recognized conservation associations may challenge by virtue of this provision encompass plan approvals granted in accordance with the laws presented supra, paras. 22 *et seq*. Actions under section 64 of the Federal Conservation of Nature Act thus cover administrative decisions for the approval of any projects listed in Annex I of the Convention.

140 As a result of these provisions, the arguments environmental organizations may rely on at trial are ab initio restricted to Conservation and Environmental Law matters. By contrast, associations may not argue that the economic or business case for a project has not been made, that the project breaches zoning or building regulations law, that it affects agriculture or forestry or the preservation of historic buildings and monuments.

141 In this context it should be noted that under German law almost all projects having a significant environmental impact are approved on the basis of the authority striking a balance between all cognizable private and public interests which effectively encompasses any legally acknowledged interests. By virtue of the restrictions imposed by s. 64 of the Federal Conservation of Nature Act, environmental organizations are unable to request a comprehensive judicial review of such a balancing decision. Rather, organizations may only claim that specific environmental and conservation interests were not accorded due regard.

2. Other members of the public concerned

142 As regards other members of the public concerned, German law distinguishes on one hand natural persons and private law legal persons, and on the other hand public law legal persons furnished with rights of their own (such as the Communicant).

a) Natural persons and private law legal persons

143 Actions brought by natural persons or private law legal persons are subject to the impairment of rights doctrine, as reflected in section 42, subsection 2, and section 113, subsection 1 of the Code of Administrative Court Procedures. When challenging a project which has a significant environmental impact, these persons thus can only argue breaches of provisions of law which confer an individual public law right on the plaintiff.

144 Consequently, they may in particular raise possible adverse effects on their land or their health. As a matter of principle, however, **they may not assert breaches of Conservation or Habitat Law, of Water Management Law, Soil Protection Law, provisions of Zoning and Building Regulations Law promoting the general interest, as well as all matters mentioned *supra*, paragraphs 140 *et seq.* , which recognized environmental associations cannot plead either. This encompasses the economic and business case for a project, adverse effects on agriculture or forestry or on the preservation of historic buildings and monuments.**

145 The only exception to this rule is where the project will result in the plaintiff's land being subject to eminent domain / compulsory purchase. In this case, the plaintiff is entitled to a comprehensive judicial review of the project's legality to the extent that the alleged breach of a legal provision creates the very cause for the land being subject to eminent domain / compulsory purchase. The legal basis for this entitlement is the right to enjoyment of property in accordance with article 14 of the Basic Law. However, the overwhelming majority of judicial challenges to projects which significantly affect the environment involve plaintiffs being affected only indirectly rather than plaintiffs with land being subject to eminent domain / compulsory purchase. Only very few projects entail the application of eminent domain rules or the compulsory purchase of land: any reasonable project applicant will go to great lengths to avoid the legal ramifications resulting from eminent domain law by purchasing the required plots of land at an inflated price. Thus the rules restricting the scope of permissible arguments apply to the overwhelming majority of projects within the meaning of Annex I of the Convention.

b) Municipalities

146 Article 28, paragraph 2 of the Basic Law confers on German municipalities an individual public law right which primarily derives from the Constitutional guarantee of local self-government. To challenge a project, municipalities thus may argue an infringement of their freedom to plan, e.g. that the project adversely affects the plaintiff municipality's planning intentions or has an adverse impact on the municipality's public installations.

147 According to the German judiciary, neither the guarantee of local self-government nor the right to enjoy the ownership of land being used for a project entitles municipalities to a comprehensive judicial review of a plan approval for a project. Even if municipal land would be subject to eminent domain / compulsory purchase, this does not result in the municipality having the right to comprehensive review. This is because municipalities – being legal persons of public law – are not holders of the fundamental right guaranteed by article 14 of the Basic Law. For this reason, the Federal Administrative Court has held that municipalities cannot require judicial review as to whether a plan approval had due regard to environmental or conservation interests (Federal Administrative Court, judgment of 17 December2013 – 4 A 1/13; order of 18 March 2008 – 9 VR 5/07).

3. Summary

148 To sum up, there is a very large body of law breaches of which, even though the law is relevant to the administrative decision, no plaintiff can plead in a judicial review procedure.

149 Also, German law distinguishes as follows: Only recognized environmental organizations have the right to argue breaches of Conservation and Habitats Law. Other members of the public concerned may argue breaches of environmental law only insofar as the relevant provisions confer an individual public law right on the plaintiff.

150 For instance, as regards provisions on limit values for air pollutants, private individuals can only argue that the immission values (i.e. the air quality standards applicable within an installation's area of impact) have been exceeded, but not that the precautionary emission limit values, i.e. the 'end-of-pipe' effluent limit values, have been exceeded.

151 **Since recognized environmental organizations lack the desirable ubiquitous presence and the requisite financial means, it continues to be private individuals and municipalities who file the overwhelming majority of legal challenges to project approvals.** Thus in most cases there will be no review of the project's legality as regards Conservation or Habitats Law, since no available plaintiff has the right to plead these matters.

152 Thus even project approval decisions which are in obvious breach of e.g. Conservation and Habitats Law run no risk of being rescinded by a court. The judiciary's power of review only encompasses a small part of the body of law which is relevant for the administrative decision on whether to approve the project.

III. Examples from the Case-law

153 The German courts have consistently held that plaintiffs' permissible arguments are limited in this manner. This legal view was expressly reaffirmed after Germany had ratified the Convention, and after the European Union had adopted what now is Directive 2011/92/EU.

154 For instance, in its order of 29 August 2012 (docket no. 2 B 940/12, available from www.juris.de), Münster Superior Administrative Court considered whether article 9, paragraph 2 of the Convention would expand the range of arguments a plaintiff whose own individual public law rights had been affected was entitled to raise at trial. Ultimately the Court refused to hear the plaintiff's arguments that the challenged development consent for a wind power generator had included an unlawful exemption from a regulation establishing a nature reserve, and that there had been a breach of species protection law.

155 The Court reasoned that the provisions of the Environmental Appeals Act had created a special right of action only for recognized environmental organizations, but not for private individuals (Münster Superior Administrative Court, order of 29 August 2012 – 2 B 940/12 – para. 49). Referring to the CJEU judgment of 12 May 2011 in Case C-115/09 (*Trianel*), the Superior Administrative Court found that article 11, paragraph 1 of Directive 2011/92/EU (i.e. the verbatim equivalent of the Convention's article 9, paragraph 2, see *supra*, para. 119) had left it for the Member States to determine, when their legal system – like the German one – so required, and within the limits laid down in article 11 of Directive 2011/92, what rights could give rise to an action concerning the environment. When making that determination, the Member States were not permitted to deprive environmental protection organizations which fulfilled the conditions laid down in the Directive of the opportunity of playing the role granted to them both by the Directive and by the Convention. Otherwise, though, the national legislature was free to restrict the rights which an individual can rely on in an action to challenge decisions, acts or omissions within the meaning of article 11 of Directive 2011/92 to individual public law rights. Such a restriction, however, did not apply to environmental organizations, because otherwise the objectives of article 11, paragraph 1 of the Directive would be disregarded (Münster Superior Administrative Court, order of 29 August 2012, at para. 53).

156 As Münster Superior Administrative Court further pointed out (id., at paras. 55 – 59), the German legislature had used its discretion as regards the implementation of Directive 2011/92 by granting a special right of action to environmental organizations, but not to private individuals. As regarded the latter, the legislature had retained the system based on the impairment of rights doctrine, as reflected in section 42, subsection 2, and section 113,

subsection 1, clause 1 of the Code of Administrative Court Procedure. The Court went on to conclude that the provisions about granting an exemption from the nature reserve regulation and about species conservation, which the applicant had attempted to rely on, were provisions of a purely objective character and, owing to a lack of special statutory regulation to the contrary, did not confer on the applicant an individual public law right. The Court believed that this continued to hold true even in view of the Convention's article 9, paragraphs 2 and 3, since the Convention in this respect followed the same regulatory scheme as did article 11 of Directive 2011/92.

157 The judgment Koblenz Administrative Court delivered on 26 January 2013 – 7 K 541/11.KO – , German text available from www.juris.de, at para. 31) in a similar manner dealt with the action an affected neighbour had filed against a permit for a major modification of an installation for the smelting of used acid-lead batteries and the recovery of lead, for refining lead and for the production of lead oxide. As the Court explained, the Convention did not require an extension of private individuals' right of action which would enable them to assert breaches of objective law, i.e. of legal provisions which do not confer individual public law rights. In particular, article 9, paragraph 3 of the Convention did not extend private individuals'' rights of action in any way. As the Court noted, this provision required each Party 'in addition and without prejudice to the review procedures referred to in paragraphs 1 and 2 above, [to] ensure that, where they [met] the criteria, if any, laid down in its national law, members of the public [had] access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which [contravened] provisions of its national law relating to the environment.' The Court believed that German law by following the impairment of rights doctrine had granted to private individuals such access, and that the Convention did not require the available rights of action to be extended. The Court concluded that the plaintiffs had no right to argue that the 96-metre chimney of the installation adversely affected the scenery, since the statutory provisions about preservation of scenery did not create individual public law rights.

IV. Legal Assessment in View of the Convention

158 The Communicant believes that both the limitations section 64 of the Federal Conservation of Nature Act imposes on environmental NGOs and the way the German judiciary applies the impairment of rights doctrine to actions brought by individuals and legal persons fail to comply with article 9, paragraph 2 of the Convention.

1. Permissible arguments in actions by NGOs

159 It is submitted that section 64 of the Federal Conservation of Nature Act clearly breaches article 9, paragraph 2 of the Convention. This is because the reasoning of the Compliance Committee in paragraphs 77 – 78 of its Findings with regard to communication ACCC/C/2008/31 applies in its entirety. As the Compliance Committee has pointed out,

> *'the Party concerned is not obliged to literally transpose the text of the Convention into its national legislation. However, when using its discretion in designing its national law, the Party concerned should not impose additional requirements that restrict the way the public may realize the rights awarded by the Convention, if there is no legal basis in the Convention for imposing such restrictions.*
>
> *Article 9, paragraph 2, requires each Party to ensure access to review procedures in relation to any decision, act or omission subject to article 6 of the Convention. The range of subjects who can challenge such decisions may be defined (limited) by the Party in accordance with the provisions of article 2, paragraph 5 and article 9, paragraph 2(a) and (b) of the Convention. However, the Party may not through its legislation or practice add further criteria that restrict access to the review procedure, for example by limiting the scope of arguments which the applicant can use to challenge the decision. While the Convention relates to environmental matters, there may be legal provisions that do not promote protection of the environment, which can be violated when a decision under article 6 of the Convention is adopted, for instance, provisions concerning conditions for building and construction, economic aspects of investments, trade, finance, public procurement rules etc. Therefore, review procedures according to article 9, paragraph 2 of the Convention should not be restricted to alleged violations of national law 'serving the environment', 'relating to the environment' or 'promoting the protection of the environment', as there is no legal basis for such limitations in the Convention.' (Findings and Recommendations with regard to communication ACCC/C/2008/31, paras. 77/8)*

160 Relying on these principles, the Compliance Committee found that, by imposing a requirement that an environmental organization, to be able to file an appeal under the German Environmental Appeals Act, must assert that the challenged decision contravenes a legal provision 'serving the environment', Germany had failed to comply with article 9, paragraph 2 of the Convention (*Ibid.*, para. 80). Section 64 of the Federal Conservation of Nature Act creates a

requirement that a recognized conservation organization, to be able to file a challenge, must assert

> *'that the decision breaches provisions of this Act, of regulations adopted or continuing to have effect on the authority of this Act, of state conservation law, or of other laws which have to be followed when taking the decision and which are intended to at least also promote considerations of conservation and landscape management'.*

161 Given the obvious similarity of this condition to the one the Compliance Committee considered in its Findings on communication ACCC/C/2008/31, we conclude that Germany, by adopting and retaining section 64 of the Federal Conservation of Nature Act, fails to comply with article 9, section 2 of the Convention.

2. Restriction of permissible arguments in actions brought by individuals and legal persons

162 We believe that the Compliance Committee's reasoning mentioned in the previous section equally applies to the restrictions the impairment of rights doctrine imposes on the range of arguments individuals and legal persons may raise at trial. This is because the impairment of rights doctrine prevents these members of the public concerned from pleading, among other things, any breach of legal provisions which expressly serve the cause of environmental protection or conservation. Under German doctrine it is such provisions which do not confer rights on individuals.

163 Given that article 9, paragraph 2 of the Convention expressly authorizes Parties to limit the range of subjects who can challenge environmental decisions, we concede that Germany by retaining the impairment of rights doctrine in the admissibility stage is in compliance with the Convention. However, we believe that Germany fails to comply with article 9, paragraph 2 of the Convention by applying the impairment of rights doctrine in the merits stage, as reflected in section 113, subsection 1, clause 1 of the Code of Administrative Court Procedures.

164 In this context we would like to emphasize that article 2, paragraph 5 of the Convention defines 'the public concerned' to mean ' the public affected or likely to be affected by, or having an interest in, the environmental decision-making'. This provision of the Convention accords a special role to non-governmental organizations promoting environmental protection: State Parties to the Convention effectively must not exclude such organizations from the range of persons which comprise the public concerned. However, **this does not mean that the natural and legal persons who are directly, e.g. in their role as neighbours or as the municipality on**

whose territory a project is to be carried out, affected by the environmental decision-making, should not have a significant role in achieving the objectives of the Convention. This is because the environmental NGOs lack the requisite staff and financial resources to participate in every single environmental decision-making procedure and to ensure by filing objections or bringing a court action that all relevant aspects relating to the environment receive due regard in decision-making about development consent or plan approval. Rather, environmental NGOs have to husband their resources and will only in exceptional cases initiate a judicial review procedure. Therefore the overwhelming majority of judicial review actions in environmental matters are brought by non-NGO plaintiffs, i.e. individuals or municipalities, who thus play a significant role in helping promote the Convention's objectives.

165 In fact it is primarily non-NGO plaintiffs who follow and monitor State Parties' environmental decision-making about development consent or plan approval, and who contribute their local knowledge and expertise by filing objections. Since they are directly affected by the projects at issue, they inevitably act in defence of their own rights and interests, such as their right to enjoy property, or – as regards municipalities – their freedom to develop plans for their territory and development. At the same time, the non-NGO plaintiffs strive to preserve the environment in their immediate neighbourhood. The idea underlying the German insistence on the impairment of rights doctrine is that neighbours or municipalities are 'not responsible or qualified' for protecting the environment or conserving nature, and therefore 'should not presume to act as guardians of nature and species.' This idea would seem to be quite incompatible with the ideas underlying the Convention: The preamble of the Convention expressly recognizes a duty of every person 'both individually and in association with others, to protect and improve the environment' and considers that, 'to observe this duty, citizens must have [...] access to justice in environmental matters'. Thus the Convention effectively calls upon the members of the public concerned to take on the role of safeguarding the environment. Also, the model of 'administrative responsibility for environmental protection' underlying the German judiciary's approach would seem to be counterproductive as regards the urgently necessary enhancement of environmental protection and mitigation of climate change through joint governmental and individual action. Environmental protection and conservation of nature are matters of concern for anyone who is directly affected by adverse impacts on the environment. Thus it should not depend on the coincidence of which kind of plaintiff is available whether the approval of a project adversely affecting the environment can be made subject to judicial review for compliance with specific environmental protection law.

3. Summary and Motion

166 To sum up, the Communicant believes that the restrictions on the scope of arguments environmental NGOs and other members of the public concerned may raise in an environmental review procedure are in breach of article 9, paragraph 2 of the Convention.

167 **For these reasons, we move for the Compliance Committee to find that:**

5. **Germany, by imposing a requirement that environmental organisations, to be able to bring an action under the Federal Conservation of Nature Act, must assert that the challenged decision contravenes a provision of the Federal Conservation of Nature Act, of Regulations adopted on the authority of this Act, of state conservation law, or of other provisions of law which are inended to at least also promote considerations of nature conservation or landscape management, fails to comply with article 9, paragraph 2 of the Convention;**

6. **Germany, by retaining the condition that an action for judicial review of an administrative decision approving a project with significant adverse environmental effect will only be well founded if provisions of law have been breached which confer an individual public law right on the plaintiff, fails to comply with article 9, paragraph 2 of the Convention.**

Part 3: Breach by German provisions on 'expediting administrative procedures' of the Convention's article 6, paragraphs 3 and 7, and of article 9, paragraphs 2 and 4

168 In this part of the communication, we will argue that Germany is in breach of its obligations under article 6, paragraphs 1(a0 and 1(b), 3 and 7, and article 9, paragraphs 2 and 4 of the Convention in that Germany has retained a variety of laws which ostensibly are meant to expedite administrative environmental decision-making procedures, but which in fact restrict participation rights and access to justice for members of the public concerned.

I. Provisions of the Convention

169 For the relevant provisions of the Convention, please refer to paragraphs 13 *et seq., supra*.

II. Provisions of German Law

170 Since the early 1990s, there has been in Germany a concerted effort to restrict the procedural rights of members of the public concerned.

171 We are aware that these enactments entered into force before the Convention became effective for Germany in 2007. However, we believe that after the Convention became binding on it, Germany should have repealed much of this legislation in order to be true to the letter and spirit of the Convention.

172 This is reflected in the following pieces of Federal legislation:

- Act for the Acceleration of Traffic Routes Planning in the new States as well as in the State of Berlin (*Gesetz zur Beschleunigung der Planungen für Verkehrswege in den neuen Ländern sowie im Land Berlin – Verkehrswegeplanungsbeschleunigungsgesetz*) of 16 December 1991, Federal Law Gazette part I, p. 2741;
- The Act for the Simplification of Planning Procedures for Traffic Routes (*Gesetz zur Vereinfachung der Planungsverfahren für Verkehrswege – **Verkehrswegeplanungs-vereinfachungsgesetz***) of17 December 1993, Federal Law Gazette part I, p. 2123, incorporated the provisions of the *Verkehrswegeplanungsbeschleunigungsgesetz* about restricted procedural rights and curtailed time periods in the sectoral Planning Legislation which applies in all of Germany, not just in the former East and in Berlin;
- The Act fot the Acceleration of Consent Procedures (*Gesetz zur Beschleunigung von Genehmigungsverfahren – **Genehmigungsverfahrensbeschleunigungsgesetz***) of 12 September 1996, Federal Law Gazette part I, p. 1354, transferred the sectoral

amendments of the law on planning procedures into the Federal Administrative Procedures Act (Verwaltungsverfahrensgestz des Bundes), in particular the provisions about the plan consent replacing the more formal plan approval, and the clauses imposing time limits for comments from other administrative authorities and establishing a preclusion regime;

- The Sixth Act to Amend the Code of Administrative Court Procedures and other Acts (*Sechstes Gesetz zur Änderung der Verwaltungsgerichtsordnung und anderer Gesetze – **6. VwGOÄndG***) of 1 November 1996, Federal Law Gazette part I, p. 1626;

- The Act for the Acceleration of Planning Procedures for Infrastructure Projects (Gesetz zur Beschleunigung von Planungsverfahren für Infrastrukturvorhaben – *Infrastrukturplanungsbeschleunigungsgesetz*) of 9 December 2006, Federal Law Gazette, part I, p. 2833.

173 All these changes of the law on administrative procedures have as their ostensible purposes the acceleration and simplification of consent procedures. They curtail the applicable time limits, provide for a rather informal planning consent (*'Plangenehmigung'*) without public participation to replace the more formal planning approval decision (*'Planfeststellungsbeschluss'*), in some cases abolish any requirement for a project to obtain prior approval, establish or expand the scope of preclusion regimes and provide for a supplementary procedure to address flaws of an initial planning approval decision or planning consent.

174 These pieces of deregulatory legislation reflect two trends. The first one is the territorial expansion of clauses, which initially were introduced and justified as an effort to address after the reunification of Germany the special situation of the new states on the territory of the former German Democratic Republic (*'Neue Bundesländer'*), to the whole of Germany after a brief 'trial period'. The second trend encompasses a transfer of clauses, which initially had been enacted for a few sectors, to generally applicable legislation: Shortly after having amended sectoral planning legislation, the legislatures incorporate the 'acceleration and simplification clauses' in the generally applicable Federal Administrative Procedures Act or its state equivalents.

175 A special feature of the various deregulatory or acceleratory enactments is that each new law on its own might arguably be compatible with the Convention. Taken together, though, the enactments continue to block the wide access to justice which the Convention envisages. Please see below for the details of the deregulatory or acceleratory legislation:

1. Changes of the Law on Administrative Procedures

a) Curtailment of the period for filing objections

176 There are unreasonably brief periods for filing objections in procedures both in accordance with sectoral planning law and with the Federal Immission Control Act. For the wording of the relavant provisions please see *supra*, paras. 20 *et seq.* After a one-month period for the documentation supporting the project to be made available for inspection, members of the public concerned have two weeks to submit written objections to the competent authority. Once the period for filing objections has expired, any objections which do not relate to special entitlements under private law are subject to preclusion.

177 As explained *supra*, at para. 19, the preclusion rules have both a procedural and a substantive effect. The procedural effect exludes any late objections from oral hearing and from consideration in the administrative decision-making. The substantive preclusive effect extinguishes plaintiffs' substantive right to challenge at trial the administrative authority's decision to grant approval for a project.

b) Requirements as to the content of objections

178 As discussed in Part 2, *supra*, the way the German judiciary applies the preclusion regime results in an unreasonably high burden of substantiation being imposed on members of the public concerned.

c) Introduction of planning consent to replace the formal plan approval

179 The acceleratory enactments provide that in specific situations the competent authority may grant a planning consent ('Plangenehmigung') without public participation, where the project has no or only an insignificant impact on the rights of others. For example, as far as it is relevant, section 18b of the General Railways Act (*'Allgemeines Eisenbahngesetz'*), reads:

> *'Planning approval decision and planning consent are subject to section 74, subsection 6 of the Administrative Procedure Act with the following provisos:*
>
> 1. *Section 74, subsection 6 of the Administrative Procedure Act – also in combination with no. 2 – applies only where, in addition to the conditions stated therein, in accordance with the Act on the Environmental Impact Assessment there is no requirement to conduct an Environmental Impact Assessment for the project,*

2. *Complementing section 74, subsection 6 of the Administrative Procedure Act, a planning consent may also be granted where there is only an insignificant impairment of the rights of others.*

3. *The planning consent has the legal effects of a planning approval decision.*

[...]

180 Notably, the *Infrastrukturbeschleunigungsgesetz* inserted provisions corresponding to section 18b of the General Railways Act into all the other sectoral planning laws referred to supra, at para. 26. Thus identical provisions now appy to a wide range of projects within the meaning of article 6 and Annex I of the Convention.

181 Insofar as it is relevant, section 74, subsection 6 of the Administrative Procedure Act reads:

> *'Planning consent may be issued instead of a planning approval decision where*
>
> > *(a) There is no impairment of the rights of others or those affected have declared in writing their consent to the utilization of their property or of some other right; and*
> >
> > *(b) agreement has been reached with those public authorities whose spheres of competence are affected.*
>
> *Planning consent has the same legal effects as a planning approval decision except for predetermination for the subsequent use of eminent domain / compulsory purchase; the granting of planning consent shall not be subject to the provisions about the planning approval procedure. [...]'*

182 As has been explained supra, paras. 24 *et seq.*, the Federal Administrative Procedures Act and its state equivalents apply to a variety of projects within the meaning of article 6 and Annex I of the Convention.

2. Restrictive provisions about court actions and interim relief

a) Abolition of rescissory actions' suspensive effect

183 In accordance with the *Infrastrukturbeschleunigungsgesetz*, an action for the rescission of a planning approval decision or a planning consent lacks suspensive effect. For example, as far as it is relevant, section 18e of the General Railways Act, as amended by the Infrastrukturplanungsbeschleunigungsgesetz, reads:

'(2) The action for the recission of a planning approval decision or a planning consent for the construction or modification of operational equipment of the railways of the Federation, for which in accordance with the Federal Railway Lines Expansion Act ('Bundesschienenwegeausbaugesetz') an urgent demand has been established, shall lack suspensive effect. The application for a ruling which, in accordance with section 80, subsection 5 clause 1 of the Code of Administrative Court Procedures, establishes the suspensive effect of an action for the rescission of a planning approval decision or a planning consent may only be made and reasons for it provided within one month after notification of the planning approval decision or the planning consent.

184 Importantly, there once again have been corresponding amendments of all the other sectoral planning laws. Thus provisions abolishing the suspensive effect of actions for rescission and imposing a brutally short time limit of one month for the submission of and provision of reasons for a request for interim relief apply to a large number of projects within the meaning of article 6 and Annex I of the Convention.

b) Curtailment of time limits for providing reasons in support of a rescissory action

185 In accordance with the deregulatory enactments, there now are short time limits for providing reasons in support of an action for the rescission of a planning approval decision or a planning consent. For instance, section 10, subsection 7 of the Air Traffic Act ('Luftverkehrsgesetz') reads:

'The plaintiff shall within a period of six weeks specify the facts and items of evidence supporting his action. Section 87b, subsection 3 [...] of the Code of Administrative Court Procedures ('Verwaltungsgerichtsordnung') shall apply mutatis mutandis.

186 Section 87b, subsection 3 of the Code of Administrative Court Procedures reads:

'The court may reject declarations and items of evidence which have not been submitted until after the expiry of a time limit set in accordance with subsections 1 and 2 and deliver judgment without further investigation, where

1. in the freely-formed opinion of the court the admission thereof would delay the conclusion of the trial, and

2. the party concerned fails to provide a sufficient excuse for the lateness, and

3. the party concerned has been notified of the consequences of missing the time limit.

Any excuse shall be credibly demonstrated on request by the court. Clause 1 shall not apply where it is possible with little effort to ascertain the facts without the cooperation of the party concerned.

187 Importantly, there once again are equivalent provisions in all other sectoral planning laws. Thus the provisions establishing a manifestly unreasonable six-week period for providing reasons and submitting evidence in support of an action for the rescission of a planning approval decision apply to almost all projects within the meaning of article 6 and Annex I of the Convention.

188 Litigation about planning approval decissions or planning consent for the construction or expansion of airports in accordance with the Air Traffic Act is a perfect example to demonstrate that the six-week time limit for providing reasons and items of evidence in support of an action for rescission is utterly and manifestly unreasonable. For instance, the administrative record of the planning approval procedure for the expansion of Frankfurt Airport comprised several hundred folders of A4 format, and just the planning approval decision itself had 2,500 size-A4 pages. Similarly, the administrative record of the planning approval procedure for the expansion of Berlin Schönefeld Airport ('Berlin Brandenburg International') was 1,800 folders of A4 format. There is just no chance anyone could within the statutory six-week period work their way through and digest such a huge amount of information, commission expert testimony, and make viable pleadings which succeed in evading the preclusion regime.

3. Procedural Illegality of Planning Approval Decisions

a) Irrelevance of Procedural Errors

189 German law considers many procedural errors irrelevant for purposes of a court ruling on whether to rescind an administrative act. Insofar as it is relevant, section 46 of the Administrative Procedure Act reads:

> *'A claim for the rescission of an administrative act [...] cannot be brought solely on the grounds that the administrative act was came into being with provisions about procedure, or territorial competence being infringed, where it is evident that the infringement has not had an effect on the substantive decision.*

190 As explained *supra*, at paras. 24 *et seq.*, this provision is applicable to all decisions for the approval of projects within the meaning of article 6 and Annex 1 of the Convention.

191 German courts have consistently held that this provision applies to any kind of administrative act, including planning approval decisions and planning consents in respect of which the competent authorities have wide margins of appreciation. It is for the plaintiff to specify why

there might have been a different substantive decision, had the procedural error not occurred. Thus section 46 effectively increases the plaintiff's burden of substantiation.

192 Admittedly, the Luxemburg Court in its judgment of 7 November 2013 (Case C-72/12) meanwhile has held that EU law does not preclude national courts from refusing to rescind an administrative decision where it is established that it is conceivable that the contested decision would not have been different without the procedural defect invoked by the plaintiff. However, the plaintiff must not bear any burden of proof in this respect. Importantly, this judgment only applies in regard of procedural errors relating to the formal Environmental Impact Assessment in accordance with Directive 2011/92/EU. Section 46 of the Administrative Procedure Act in its interpretation by the German judiciary will continue to govern other procedural errors within its scope of application. Indeed, even after the Court of Justice of the European Union had rendered its judgment in Case C-72/12, the Federal Administrative Court considered it appropriate to apply section 46 to flaws relating to the availability of project documents for inspection in the context of an Environmental Impact Assessment (Federal Administrative Court, judgment of 21 November 2013 – 7 A 28/12, at paras. 31 *et seq.*, available from www.juris.de)

b) Retroactive correction of procedural flaws

193 Thus by virtue of section 46 of the Administrative Procedure Act procedural errors of an administrative decision for the approval of a project as a rule are irrelevant. Should such a flaw exceptionally be relevant, German law permits its retroactive correction. Insofar as it is relevant, section 45 of the Federal Administrative Procedure Act (*'Verwaltungsverfahrensgesetz des Bundes'*) reads:

> *'(1) An infringement of the provisions governing procedure or form [...] shall be irrelevant where*
>
> *1. The requisite application for the issuance of the administrative act is subsequently made,*
>
> *2. The requisite statement of reasons is subsequently provided,*
>
> *3. The requisite hearing of a participant is subsequently held,*
>
> *4. The decision of a committee whose participation in the issuance of the administrative act is required is subsequently taken;*
>
> *5. The requisite collaboration of another authority is subsequently obtained.*

(2) Procedural steps subject to subsection 1 may be corrected until the conclusion of the administrative court procedure.

194 This provision has a wide scope of application. For instance, the Federal Administrative Court has held that this clause permits the retroactive correction of errors committed in the process of screening a project as to whether it is subject to the requirement for an Environmental Impact Assessment (Federal Administrative Court, judgment of 20 August 2008 – 4 C 11/07 –, 131 BVerwGE 352-369, para. 24)

195 As explained *supra*, at paras. 24 *et seq.*, the Federal Administrative Procedure Act and its state equivalents apply to decisions for the approval of projects within the meaning of article 6 and Annex I of the Convention.

196 By virtue of section 45 of the Administrative Procedure Act the defendant can unilaterally remove the hitherto certain prospect of an action's success, without the plaintiff being able to do anything about it, and with the plaintiff still risking liability for most of the costs of the trial. As a matter of principle, the losing party pays the costs of the judicial proceedings (section 154, subsection 1 of the Code of Administrative Court Procedures). Any costs resulting from the fault of one party may be imposed on the party concerned (section 155, subsection 4 of the Code of Administrative Court Procedures). Thus it is at the Court's discretion to impose part of the costs on the defendant administrative authority, should a plaintiff lose a case owing to procedural flaws having in accordance with section 45 of the Administrative Procedure Act been corrected retroactively.

197 Also the retroactive opportunity for intervenors to comment on, e.g., a planning approval decision, which has already been granted and which is now being defended vigourously in court by the competent authority, would be completely nugatory: If the administrative procedure had been conducted lawfully, intervenors would have had an opportunity to participate during the administrative procedure, i.e. at a time when the competent authority has not yet made up its mind and different options are still under investigation. At this time there would have been a chance for comments made by intervenors to have an impact on the competent authority's decision-making. If the opportunity to comment is provided retroactively, i.e. after the administrative decision has been issued and while it is being challenged in court, any comments intervenors make at this time inevitably will be without any impact. An opportunity to be heard retroactively thus is inherently pointless. This is particularly concerning in the context of planning approval decisions whose issuance is at the discretion of the competent authority and / or in regard to which the authority has significant margins of appreciation.

4. Substantive Illegality

198 By virtue of the acceleratory enactments in their interpretation by the German judiciary, even substantive flaws of a planning approval decision for a project having significant environmental impact now only exceptionally result in a rescission of that decision. This is the effect of the following provisions.

a) Retroactive Amendment of Reasoning

199 Administrative authorities now have the opportunity until the conclusion of the proceedings in the Administrative Court to amend retroactively their reasoning in support of an administrative act. Section 114 clause 2 of the Code of Administrative Court Procedures reads:

> *The administrative authority may even during the proceedings in the Administrative Court complement its reasoning in respect of using any discretion as regards the administrative act.*

200 Similar to section 45 of the Administrative Procedure Act this provision is another device for the defendant authority to remove the hitherto existing prospects of success for the plaintiff's action. And, similar again to the section 45 situation, the plaintiff will continue to bear the risk of liability for most of the court proceeding's costs.

b) Relevance only of Obvious Substantive Flaws

201 As a matter of substantive law, it is only obvious flaws which will result in a planning approval decision being rescinded. There are provisions to this effect in both the Administrative Procedure Act and the sectoral planning legislation. For instance, section 75, subsection 1a of the Administrative Procedure Act reads:

> *'Flaws in the balancing of public and private interests affected by the project shall be deemed significant only insofar as they are obvious and have had an impact on the result of the balancing exercise. Significant flaws in the balancing as well as any infringement of provisions on form and procedure shall only result in the decision being rescinded insofar as they cannot be corrected by supplementing the planning approval decision or by a supplementary procedure.'*

202 There are equivalent clauses in the various sectoral planning laws (e.g. section 10, subsection 8 of the Air Traffic Act). Thus provisions limiting the relevance of substantive flaws are applicable in any trial to challenge the approval of a project within the meaning of article 6 and Annex I of the Convention.

203 The Federal Administrative Court has opted for a restrictive interpretation of the clause which requires an 'impact on the result of the balancing exercise' for flaws in the balancing to be significant. It is for plaintiffs contesting an environmental planning approval decision to specify with regard to the situation at hand why in the absence of the alleged flaw there possibly would have been a different outcome of the balancing exercise – the 'purely abstract possibility' of a different outcome is not sufficient for a flaw in the balancing to be significant (Federal Administrative Court, judgment of 24 November 2011 – BVerwG 9 A 23.10, at para. 68).

c) No 'Unsolicited Search for Flaws'

204 The Federal Administrative Court has time and again admonished the courts of first instance 'not to engage in an as it were unsolicited search for flaws' of a contested administrative decision (see, e.g., Federal Administrative Court, judgment of 7 September 1979 – BVerwG 4 C 7.77; order of 1 April 1997 – BVerwG 4 B 206.96; order of 20 June 2001 – BVerwG 4 BN 21.01; judgment of 17 April 2002 – BVerwG 9 CN 1.01; order of 4 October 2006 – BVerwG 4 BN 26.06; order of 27 September 2012 – BVerwG 4 BN 20.12; order of 3 July 2013 – BVerwG 9 B 5.13). We believe that this body of case-law has across the board helped increase the burden of substantiation imposed on plaintiffs – including on plaintiffs challenging environmental decision-making.

d) The 'Rule in Favour of Saving a Flawed Planning Approval Decision'

205 Even where a substantive flaw is relevant in accordance with these principles, the Courts will apply the rule in favour of 'saving' a flawed planning approval decision ('Planerhaltungsgrundsatz') and therefore refuse to quash the decision, if the flaw can be rectified by supplementing the decision or by conducting a supplementary procedure. This is is considered to be an overarching principle which goes beyond the literal scope of the provision cited *supra* at para. 201.

5 Summary

206 The combination of the various deregulatory or acceleratory enactments has resulted in substantively correct judments effectively becoming a matter of coincidence. Judicial review only covers the fragments of the relevant facts and the legal issues which made it past the preclusion regime. Procedural flaws which occurred in the administrative stage will at trial most probably be considered retroactively made good pursuant to s. 45 or to lack relevance in accordance with s. 46. Substantive flaws will almost inevitably be ruled to have had no impact on the result of the balancing exercise. Where exceptionally a procedural error or substantive error is considered relevant, the affected planning approval decision still will not be quashed, where the procedural error can be rectified by a supplementary procedure, or the substantive error can

be made good by supplementing the planning approval decision. Consequently, flawed environmental decisions nevertheless will continue to have legal effect – a situation which would seem to put the rule of law in jeopardy, and to thwart the Convention's objective of improving the enforcement of environmental law by providing wide and effective access to justice for members of the public concerned.

207 The ostensible rationale for the various legislative amendments is to accelerate the approval of infrastructure projects with a view to strengthening Germany's position as an attractive location for businesss (*'Wirtschaftsstandort Deutschland'*). Empirical research published in 2005, however, has pointed to the true reasons for the long duration of infrastructure planning procedures (for a summary of the relevant study, see *Ziekow / Windoffer / Oertel*, 2006 Deutsches Verwaltungsblatt 1469 et seq.). The most important factor to determine the time it takes for a project to be approved is the time the applicant spends preparing a complete set of documents in support of the project. Also, the time necessary for the administrative authority to render its decision is another important factor. By contrast, the public participation procedures only have a negligible impact on the duration of approval processes. Nevertheless, what the acceleratory enactments have primarily aimed to do is limit participation rights of the public concerned, ostensibly to speed things up where there is no discernible need to do so (see also *Steinberg / Allert / Grams / Scharioth*, Zur Beschleunigung des Genehmigungsverfahrens für Industrieanlagen – eine empirische und rechtspolitische Untersuchung, 1991).

III. Legal observations

1. Breaches of the Convention by the German Provisions about Administrative Procedures

208 We believe that by retaining the provisions about the rigid time limit for filing objections (supra, paras. 20 *et seq.*) Germany is in non-compliance with article 6, paragraph 3 of the Convention.

209 The Compliance Committee has clarified that

> *'[t]he requirement to provide 'reasonable time frames' implies that the public should have sufficient time to get acquainted with the documentation and to submit comments taking into account, inter alia, the nature, complexity and size of the proposed activity. A time frame which may be reasonable for a small simple project with only local impact may well not be reasonable in case of a major complex project (Findings and recommendations with regard to communication ACCC/2006/16; ECE/MP.PP2008/5/Add.6, 4 April 2008, para. 69)*

210 The Implementation Guide to the Covention explains on page 102 that to implement article 6, paragraph 3 of the Convention correctly, state parties need to consider the following aspects:

> *'This provision of the Convention also refers to the 'different phases'. Considering the rationale behind the nead for reasonable timeframes (giving information, allowing the public to prepare and effective participation), the reference to 'phases' should relate directly to these phases of the public participation procedures. Thus, each phase during the public participation procedures must include reasonable time-frames taking into account the fundamental requirements of public participation. In complex cases where public participationma y take place at several points int he decision-making process, the reference to different phases may also be taken to refer to phases in the overall decisionmaking process. Thus, Parties must ensure that all stages of the decision-making where public participationtakes place include time-frames that allow for the effective implementation of the related requirements in article 6, including time for the public to digest the information provided in the notification according to paragraph 2, time to seek additional information from the public authorities identified in the notification, time to examine information available to the public, time to prepare for participation in a hearing or commenting opportunity, and time to participate effectively in those proceedings.*
>
> *Finally, the reasonable timeframes must also take into account the interaction between article 6 and other parts of the Convention. For example, it may be necessary for a member of the public to request information under article 4, following the notification and as part of the preparation for participation in a hearing or commenting opportunity. Parties should build flexibility into the system to ensure, for example, that waiting for a request to be met in the time limits set out in article 4 does not undermine the public participation process [...]. While not specifically mentioned in the Convention, reasonable time-frames may also benefit the public authorities, by providing sufficient time to manage the process of public participation and to process the information provided by the public.*

211 German law does not even attempt to take these factors into account. Rather, it retains provisions which impose a rigid, one-size-fits-all time limit for the inspection of the documentation by members of the public concerned and for filing objections. Thus Germany is in breach of article 6, paragraph 3 of the Convention in that it retains provisions setting a standard time limit, no matter the size and complexity of the project.

212 As regards the German provisions which authorize that the planning consent, which is granted without any public participation, may replace the planning approval decision, we believe that these clauses at least in some cases breach article 6, paragraph 1(a) and (b) of the Convention. This is because in our view these provisions do not ensure that all projects which objectively may have a signficant impact on the environment are made subject to public participation.

2. Breaches of the Convention by German Provisions about Rescissory Actions and Interim Relief

213 The provisions which abolish the suspensive effect of actions for rescission and set a one-month time limit for submitting and providing reasons for a request for a ruling to establish an action's suspensive effect (*supra*, para. 183) in our view are in breach of article 9, paragraph 4 of the Convention. This is because they render injunctive relief – which is what the German law about suspensive effect of an action is about – available only theoretically rather than in practice. The Compliance Committee has held that, in order to comply with article 9, paragraph 4 of the Convention, a state party's law must ensure that injunctive relief is available in practice (Findings and Recommendations with regard to Communication ACCC/C2008/26, para. 103).

214 We further believe that the provisions which set a six-week time limit for the plaintiff to specify the relevant facts and items of evidence (*supra*, para. 186) are manifestly unfair to plaintiffs in environmental matters and fail to provide for equitable judicial review procedures; therefore they are in breach of article 9, paragraph 4 of the Convention. This is because because the relevant provisions apply to highly complex projects, with the supporting documentation easily comprising tens of thousands of pages and contested decisions running into the thousands of pages. Also, in many cases it is the state itself or a private law entity controlled by the state who is the applicant for the project. Thus the state in the administrative stage no longer has the role of impartial arbiter. All this adds to the unfairness of the judicial review regime. Article 9, paragraph 4 of the Convention requires state parties to ensure that judicial review procedures are fair and equitable, with 'fair' signifying 'fair for the plaintiff' (for relevant Compliance Committee case law on this point, see *supra*, para. 125). The Implementation Guide further explains (at p. 133/4):

> *'The ultimate objective of any administrative or judicial review process is to obtaina remedy for a transgressiono f law. Under paragraph 4, Parties must ensure that the review bodies provide "adequate and effective" remedies. These remedies are to include injunctive relief when appropriate. [...]. Adequacy requires the relief to ensure the intended effect of the review procedure. This may be to compensate past damage, prevent future damage and / or to provide for restauration. The*

requirement that the remedies should be effective means that they should be capable of real and efficient enforcement. Parties should try to eliminate any potential barriers to the enforcement of injunctions and other remedies. In addition to specifying kinds of remedies, article 9, paragraph 4, requires Parties to ensure that review procedures under paragraphs 1, 2, and 3 are 'fair, equitable, timely and not prohibitively costly'. [...] Equitable procedures are those which avoid the application of the law in an unnecessarily harsh and technical manner.

215 In our view, the relevant German procedures do not comply with the requirement that review procedures are equitable.

3. Breach of the Convention by the German Provisions relating to Procedural Illegality

216 It is further submitted that the German provisions about the irrelevance of procedural flaws (*supra*, para. 189) and the retroactive correction of such flaws which exceptionally are relevant (*supra*, para. 196) add to the German judicial review regime's inherent lack of fairness.

4. Breach of the Convention by the German Provisions Relating to Substantive Illegality

217 In our view the provisions permitting the retroactive amendment of an administrative decision's reasoning (*supra*, para. 199) further add to the German judicial review system's inherent lack of fairness and thus provide additional support for our view that Germany is in non-compliance with article 9, paragraph 4 of the Convention.

218 This also holds true with regard to the German clauses limiting the relevance of flaws in the balancing of public and private interests (*supra*, para. 201). These clauses also effectively limit the range of possible arguments a plaintiff can rely on in a judicial review procedure (for Compliance Committee case-law on this point, see *supra*, para. 106). Therefore they are in breach of article 9, paragraph 2 and paragraph 4.

219 The judicially developed rules against 'unsolicited search for flaws' and the rule in favour of saving a flawed planning approval decision (supra, paras. 204 / 205) both further add to the German judicial review system's inherent lack of fairness within the meaning of article 9, paragraph 4 of the Convention.

5. Cumulative Effect of the German Provisions Combined

220 The cumulative effect of the German provisions referred to in this Part of the Communication renders the German system of judcial review in environmental matters utterly and manifestly unfair to plaintiffs, contrary to what article 9, paragraph 4, of the Convention aims for.

6. Motions

221 **For the reasons just stated, we move for the Compliance Committee to find that Germany, by retaining and continuing to apply a combination of:**

7. **Rigid, one-size-fits-all time limits for public participation;**
8. **A regime for the preclusion of out-of-time comments;**
9. **A regime permitting the issuance of planning consent without public participation;**
10. **Provisions which abolish the suspensive effect of actions for rescission;**
11. **Clauses which set a one-month time limit for the submission of and provision of reasons for a request for a ruling to establish an action's suspensive effect;**
12. **Clauses which set a six-weak time limit for the specification of relevant facts and items of evidence in support of an action;**
13. **Clauses which declare irrelevant and permit the retroactive correction of procedural flaws;**
14. **Clauses which permit the retroactive amendment of the reasoning in support of an environmental planning approval decision;**
15. **Clauses which limit the relevance of flaws in the balancing of public and private interests,**
16. **A rule against unsolicited judicial search for flaws;**
17. **A rule in favour of saving a flawed planning approval decision**

is in non-compliance with article 6, paragraph 1(a) and (b); article 6, paragraph 3; and article 9, paragraphs 2 and 4 of the Convention.

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